CN
GFF
MEP

NEW YORK SUPREME COURT,

Appellate Division--Second Department

PATRICK H. FLYNN,

Appellant

against

THE BROOKLYN CITY RAILROAD COMPANY and THE BROOKLYN HEIGHTS RAILROAD COMPANY,

Respondents

RECORD AND POINTS ON APPEAL

William C. Trull,

Attorney for Respondents

N. Y. Supreme Court,

APPELLATE DIVISION—SECOND DEPARTMENT.

PATRICK H. FLYNN,
Appellant,

AGAINST

THE BROOKLYN CITY RAILROAD COMPANY and the BROOKLYN HEIGHTS RAILROAD COMPANY,
Respondents.

POINTS FOR APPELLANT.

Statement.

This appeal is from a judgment dismissing the complaint on trial at Special Term, Mr. Justice OSBORNE presiding, entered on the decision of a motion made on the plaintiff's pleadings at the close of plaintiff's opening and before any testimony was taken.

This action is brought by a stockholder in the Brooklyn City Railroad Company to set aside a lease made by that company to the Brooklyn Heights Railroad Company; to compel the re-transfer of all of the property that passed under the lease, and an accounting by the lessee to the lessor of the earning of the property while held under the claim of lease, and payment of the earnings to the lessor by the lesse made by the property while in possession of the lessee.

I.

The complaint must be treated as if it had been demurred to, and the sole question before the Court is does it sufficiently state a cause of action?

Sheridan vs. Jackson, 72 N. Y., 170.

The facts charged in the complaint, then, must be taken as true for the purposes of this appeal.

FACTS.

The Lessor.

The lessor was the Brooklyn City Railroad Company, a domestic corporation owning and operating a railroad in Brooklyn and the adjoining towns of Kings and Queens Counties. The roads are constructed and operated on one hundred miles of streets, and it possesses franchises covering many other streets. It possesses valuable real estate bearing depots, stables, car houses, electric power houses and other structures, and it possesses cars, horses, electric cars and a complete equipment for a railroad. Its capital stock was 9,000,000, increased after the lease to $12,000,000, fully paid in. Its dividends had been regular and large, and previous to the lease eight per cent. In 1892 it obtained the right to use electricity as a motive power, and prior to the lease it engaged in making this substitution, and had completed and was operating this system upon some of its routes. The value of its franchises, realty and property prior to February 15, 15, 1893, was more than $30,000,000, and it could command all funds necessary for equipment and operation of all of its routes by electricity.

The Lessee.

The lessee was the Brooklyn Heights Railroad Company, a domestic corporation with a franchise to operate a road half a mile or so in length along a single street in Brooklyn. Its bonded indebtedness was $250,000; its capital stock was $200,000, which was worth not more than fifty per cent. of par; its entire property was worth about $350,000, and its gross earnings did not equal its operating expenses and its fixed charges.

The Scheme.

Certain persons, some of whom were directors in the Brooklyn City Railroad Company, planned to have the Brooklyn City Railroad Company execute a lease of all of its franchises and property to the Brooklyn Heights Railroad Company at a rental which should be less than the earnings of the Brooklyn City Railroad Company. Then these persons and their allies, owning the stock of the lessee, would be enabled to profit by the difference between the rental paid to the Brooklyn City Railroad Company and the earnings made by the property of that company.

And there were profits made in the transaction itself.

First, these persons acquired the control of the stock in the Brooklyn City Railroad Company. Then they caused the directors to issue a circular to each stockholder in the corporation that a syndicate would procure the leasing of their corporation by a street surface railroad company which would guarantee 10 per cent. dividends on the stock and would pay fixed charges and taxes and assessments. The syndicate were to give to the stockholders the right to purchase three shares of a traction company's stock par $100 for every ten shares par value of $10, held by the stockholders, on the payment of $15 a share therefor. The stock of the traction company was to be $30,000,000 and one-tenth

thereof, not to be alloted to the Brooklyn City Railroad stockholders, was to be purchased by the syndicate at the same rate paid by the stockholders. The surplus in the treasury of the Brooklyn City Railroad Co. was to be divided among its stockholders. The scheme was unanimously recommended by the directors.

Pursuant to the scheme the lease was executed, and on June 6, 1893, the entire property of the Brooklyn City Railroad Company passed to the Brooklyn Heights Railroad Company.

Then was organized a foreign corporation known as The Long Island Traction Company with $30,000,000 of capital, which became the owner of the entire capital stock of the Brooklyn Heights Railroad Company, the lessee. The stock of this traction company had no value whatever except that derived from the ownership of the stock of the said lessee, which itself was of no value whatever save that it was the lessee of the Brooklyn City Railroad Company. Under the scheme no more than 270,000 shares of the traction company stock was to be alloted to the stockholders of the Brooklyn City Railroad Company in the proportion offered of three for ten and on the payment of $15 a share. Thirty thousand shares were reserved by certain persons shareholders in the Brooklyn City Railroad by their own use and benefit. To recapitulate:

The Brooklyn City Railroad Company was great, prosperous and profitable; it could obtain all the money it needed. It had paid eight per cent. dividends as a horse railroad upon its routes already operated. It had the franchises for many more.

It was empowered to use electricity. This motive power alone would decrease its operating expenses thirty to forty per cent., and it was able to pay at least fifteen per cent. dividends on its increased capital stock.

The Brooklyn Heights Railroad Company had no franchise but half a mile on a single street, was not paying and possessed no property worth more than $550,000, while its stock was worth fifty cents on the dollar.

The Traction Company was a foreign corporation whose stock had no value whatever, save that it was the owner of the Brooklyn Heights Company stock. By this scheme the Brooklyn City Railroad Company was stripped of all of its franchises and property and became a mere skeleton for 999 years, and its stockholders were absolutely bound to ten per cent. dividends for all time instead of all of the earnings of their corporations.

Every cent that the Brooklyn City Railroad Company system earned over the rental went to the Brooklyn Heights Railroad Company, which was owned by the traction company. This excess would be at least five per cent. upon the whole capital stock.

But it may be asked "*where is the wrongdoing? This is a mere speculation.*" We answer: first, the stockholders of the Brooklyn City R. R. Co. are deprived of their full earnings of their property; second, the persons who controlled the Brooklyn City Railroad Company also controlled the Brooklyn Heights Railroad Company, both lessor and lessee at the time the lease was made. The traction company stock was not allotted to the Brooklyn City Railroad Company stockholders on exchange, but only on the payment of $15 a share. This was in effect an assessment of $15 a share on every shareholder for the privileges of receiving full dividends on his own property. And this virtual assessment was upon non-assessable stock. The traction company stock was not all open to purchase by the stockholders of the Brooklyn City Railroad; *one-tenth* was reserved for the syndicate to be purchased at the same rate as that paid by the stockholder; *i. e.*, $15 a share. Thus, the syndicate bought for $15 a share what the stockholder had to pay, not only $15 a share for, but also had to yield up his right to any dividends for, and three millions of dollars of par value thereof were diverted into the pockets of the syndicate.

The traction company furnished the element of ledgermain. The same parties, at the time the lease was made, controlled the lessee and the lessor. The lessor

was solvent and powerful. The lessee was insolvent and weak. The lessor gave up everything and was to be paid out of its own property *by part of its earnings.* The lessee furnished nothing, simply entered into possession and used the same property and made its profits entirely out of the difference of rent and the difference of earnings. The traction company was necessary to the juggler. The statement issued to the stockholders sets forth that the leasing will be to a street surface railroad company. Then after a paragraph or two follows the statement regarding the traction company with its great capital stock and its potentialities and its offer to embrace the shareholders of the Brooklyn City R. R. Co. *for a consideration.* But after all it is seen that the traction company, like its little dummy the nominal lessee, is to live and thrive only as a parasite of the property of the Brooklyn City Railroad Company and that it will take to its promoters the $15 a share virtual assessment on the stockholders of the Brooklyn Railroad Company *and* the one-tenth of its whole capital stock for which its promoters will pay but $15 a share. What is the end? Simply that the Brooklyn City Railroad Company is owned for 999 years by the traction company and the Brooklyn City stockholder who becomes a traction stockholder by paying $15 a share additional becomes entitled to what? But a portion of the earnings to which he would have been entitled if the lease had never been made, to share which he has had to put up the $15 per share. The traction company gains from him the $15 a share if he comes into the scheme and the traction company promoters also gain three millions of dollars at par by paying $15 a share for stock that cost the Brooklyn City Railroad stockholders $15 and the surrender of all of the dividend earning power of their Brooklyn City Railroad stock beyond 10 per cent. If he does not pay this assessment, he must submit to receiving but ten per cent. dividend on his stock when it is really earning 15 per cent., which excess is being received by the promoters of the scheme.

It is distinctly charged that the same individuals, some of them directors, controlled lessor and lessee when this lease was made. It is distinctly charged that some of the persons who entered into the scheme were directors of the Brooklyn City Railroad Company at the time. It is distinctly charged that the scheme was engineered and consummated to defraud the stockholders of the said railroad company and that it did so. The Court of Appeals comments upon such such contracts as this as follows:

People vs. N. R. S. Co., 121 N. Y., 614: "A vendor "about to sell his property, and to a very large "amount, naturally looks carefully to his pay. A "merchant or manufacturer who should sell his wares "to a corporation having no other capital than the "exact property bought, and take his pay in the stock "of such corporation, would scarcely be deemed sane "in business circles."

II.

Action lies for such a course of dealing as is charged in this complaint.

Leslie vs. Lorillard, 101 N. Y., 532, 535, 536.
Hawes vs. Oakland, 104 U. S., 150.
Sage vs. Culver, 147 N. Y., 245.
Meyer vs. Staten Island Co., 7 State Rep., 245.
Gamble vs. Queens Co. Water Works Co., 123 N. Y.

A stockholder can sue.

Gamble vs. Queens Co. W. W. Co., 123 N. Y., 98.
Barr vs. N. Y., L. E. & W. R. R. Co., 128 N. Y., 273, 274.
Currier vs. Ives, 35 Hun.
Brinkerhoff vs. Bostwick, 88 N. Y.

Cook on Stockholders, Sec. 684.
Brown vs. Boston Theatre Co., 104 Mass., 95.
Morawitz on Corp., 417.

It is immaterial how small the interest or share of the stockholder may be.

Nash vs. Hall, 11 Misc. Rep., 469.

III.

The complaint was dismissed on two grounds as indicated in the opinion :

1. That there was no sufficient allegation of demand upon the officers and directors of the corporation to bring suit in the first instance and of a refusal.

2. That it did not appear that the plaintiff sued in a representative capacity.

As to the first ground

Conceding, for argument, that a demand was necessary, we proceed to examine the pleading.

The relevant allegations in the complaint are Sections 29 and 30 at page 10 of the printed case.

The principle which requires the demand is derived from the theory that the action should be brought in the first instance by the corporation itself, and that only when it has had notice to do so and has failed, is the stockholder entitled to bring suit. The essential fact to be shown in the pleading and proven to the Court is that the corporation has been asked to institute a suit and that it has failed to do so, and that the circumstances are such that the stockholder cannot look to his corporation for relief in the premises. If, after a demand, the corporation remain inert and make no sign, and such inertia is continued, these are facts

from which the refusal of the corporation to act can be inferred as much as if a refusal had been made in direct terms. It does not touch the essential principle whether the corporation say no, or after demand upon it, does nothing for such time and under such circumstances as might legally warrant the inference that it did not intend to act. The salient point is whether the corporation will act upon demand. If it refuse to act in set terms, or its conduct is such as to warrant the legal inference that it will not act, then the stockholder may come into the forum himself, in default of the corporation.

Sir George Jessel, M. R., in *Russell vs. Wakefield Water-Works Co., L. R., 20 Eq., 474-482, says :* "It is "not absolutely necessary that the corporation should "refuse by vote at the general meeting if it can "be shown either that the wrongdoer had "command of the majority of the votes or "that it would be absurd to call the meeting "or if it can be shown that there has been a general "meeting substantially approving of what has been "done, or if it can be shown, from the acts of the cor-"poration as a corporation, distinguished from the "mere acts of the directors of it, that they have ap-"proved of what has been done and have allowed a "long time to elapse without interfering, so that they "do not intend and are not willing to sue. In all these "cases the same doctrine applies, and the individual "incorporator may maintain the suit."

If it appear that the stockholder made repeated demands, and that the corporation or the directors have utterly failed and neglected to take any action, there is a legal inference of a refusal which avails the stockholder as much as if there had been a positive refusal.

The case cited by the learned counsel below and the only case cited by the Court as a direct precedent *(Greaves vs. Gouge, 69 N. Y.*, goes rather to the general principle*)*, is *Leslie vs. Lorillard, 31 Hun, 306.* This holds that the allegation that the defendant has neglected to bring such action is not equivalent to an allegation that the defendant has refused to do so.

The Court say : " It is not stated how long such " *neglect continued whether for a day, a month or* " *year or any other time and there is nothing from* " *which the Court can lawfully infer that such neglect* " *is equivalent to a refusal,*" or in other words a mere neglect *continued for a time* may be in the eye of the law equivalent to a refusal.

The learned Justice seems to base his opinion upon the fact that there was no pleading of a " refusal " *in hæ verba.* But if there must be a positive refusal, in an affirmative form on the part of the corporation or its directors, then it could forever hold the stockholders at defiance. All that is necessary is wholly to disregard the demand made upon it.

Section 29 alleges that the stockholder demanded the corporation and its officers and directors his share of the proceeds beyond the ten per centum reserved in the lease, but that it refused and neglected to pay them.

Section 30 charges that plaintiff has, from time to time, notified the directors and officers are unlawful and an injury and not distribution of all the profits, and that such demand necessarily involved the annulment of the lease ; but that said officers have " *failed and neglected* " to take any proceedings towards annulling of said lease and agreement.

We are thrown out of court because we only allege that *from time to time* we have demanded such action as would annul the lease, and that the officers and directors have " *failed and neglected* " to take any proceedings. This the learned Court in effect says is not equivalent to an allegation of " refusal " to take proceedings, and on this the whole question hangs. But, as already pointed out in the very precedent cited, the Court said : " It is not stated how long such neglect continued, whether for a day, a month or a year, or for any other time, and there is nothing from which the Court can lawfully infer that such neglect is equivalent to a refusal." In that case there was the allegation of *a* demand and *a* neglect. In the case at bar there is the allegation of a *demand from time to time* and of failure *and* neglect.

A demand from time to time, or repeated demands and a failure to act, may afford evidence sufficient to warrant the Court in finding such course of action as "is equivalent to a refusal;" at least, that statement in a pleading should prevent the Court from finding on the pleading that there was no allegation of a demand and refusal.

But we do not alone plead neglect, we pleaded repeated demands and *failure* and neglect. The words refusing and failing in such a case as this are synonymous and *equipollent*.

In *Taylor vs. Mason*, 9 Wheat., 325-344, MARSHALL, C. J., said: Although the words refusing to comply may in general have the same operation in law as the words failing to comply would have, yet in this case they are accompanied, etc. Where the condition to be performed depends on the will of the devisee, his failure to perform is equivalent to a refusal. But where the condition does not depend on his will, but on the will of those over whom he can have no control, there is a manifest distinction between refusing and failing to comply with it. The first is an act of the will, the second may be an act of inevitable necessity." This language applies here. It was within the power of the officers and directors of the corporation to bring this suit, as on them alone did the decision depend. There is no material difference then between refusal, and a failure and neglect after *demands from time to time*, if the inference can be drawn from the conduct after repeated demands that the corporation does not propose to act.

In *Leslie vs. Lorillard itself*, *supra*, the Court in effect says a neglect continued may be equivalent to a refusal. We have alleged demands from time to time, and not only neglect, *but failure* as well.

This is not the discussion of a statute or the refinement of words; the only question is whether the pleading justifies the Court in finding an absolute failure therein to allege an application to the corporation in the first instance, and such an action, failure or refusal on *its* part as warranted *us* in setting the Court in motion.

The second ground :

This is that the suit is not brought in a representative capacity.

The corporation of which the plaintiff is a stockholder is made a defendant. The plaintiff sets up that he is the owner of but 500 shares ; he alleges that it is in a position to pay larger dividends than are represented by the rentals to its stockholders ; he charges that the lease scheme was concocted to divert a part of the earnings from the stockholders, that the scheme was to defraud the stockholders, that the allotment of stock was no compensation to the stockholders, that the stockholders are entitled to all of the earnings of the company, that the stockholders have been usaged and defrauded, and he finally demands judgment that the lease be declared null and void ; that the property be retransferred to the defendant the Brooklyn City Railroad Company, and that the lessee be directed to account and pay over to the lessor all moneys received from the operation of the road.

Morawitz on Corporations states the rule thus :

"If a portion only of the shareholders are complainants, the suit should purport to be brought by the plaintiffs in behalf of themselves and all other shareholders similarly interested. But this is merely a technical rule of practice. The suit must, by reason of the character of the relief prayed, be for the benefit of the corporation or all the shareholders, whether it purports to be for their benefit or not. In some cases the allegation that the suit was brought by the plaintiff on behalf of all others similarly interested has, therefore, been dispensed with."

In *Beralzheimer vs. Strauss, 51 N. Y. Super. Ct., at page 99*, the Court say : "If the averments, "frame and scope of the complaint affix to the "plaintiff a representative character and standing "in the litigation, it is sufficient *(Beers vs. Sher-"man, 12 Hun, 163*, affirmed on this point, though

" reversed on another in *73 N. Y., 292* ; Stillwell
" vs. Carpenter, 2 Abb. N. C., 238 (s. c., 62 N. Y.,
" 639)."

Appeal Book in Barr vs. N, Y., Lake Erie & Western R. R Co., 924, reported in 125 N. Y.

Sage vs. Culver, 147 N. Y., 245.

IV.

The judgment should be reversed and trial ordered on the pleadings.

JAMES C. CHURCH.
ALMET F. JENKS.
Counsel for the Appellant.

Supreme Court,

APPELLATE DIVISION—SECOND DEPARTMENT.

PATRICK H. FLYNN,
Appellant,

against

THE BROOKLYN CITY RAILROAD COMPANY and THE BROOKLYN HEIGHTS RAILROAD COMPANY,
Respondents.

Points in behalf of the Brooklyn City Railroad Company,
Respondent.

It could have served no purpose, at the trial, for the plaintiff to have withheld his admission of the well-known fact that the lease of the Brooklyn City Railroad to the Brooklyn Heights Railroad Company was voted for by more than two-thirds of the stockholders of the Brooklyn City Railroad Company; and that such had been the effectual operation of the lease for the period of two years, during which the lessee had been in possession, that the plaintiff stood alone in opposition to its continuance or support. Nor could it serve any purpose, now and here, to equivocate upon a matter of fact so easily susceptible of incontrovertible proof. If more than two-thirds so voted, that vote is of

record and even the ballots can be produced. If, since that vote, the absent or the present minority have given in their approbation; have taken their share of the rental and purchased their portion of the traction stock; even if the plaintiff be himself stranded in this equivocal situation, it could easily be proven by evidence which could not be contradicted. So that the adroit and learned attorney for the plaintiff was quite wise and right in sparing the time of the Court, in what must have consumed several weeks of a fruitless trial, by frankly making a statement of these cardinal facts in advance.

It is true the statement was followed by a dismissal of the complaint; but the complaint, if not demurrable in itself, was sure at some time to encounter these facts in proof; and as these facts inevitably raise a decisive issue it was wise and proper to meet it at the outset.

POINT FIRST.

An action in equity for administrative relief against the conduct and transactions of a corporation, which are not intrinsically ultra vires, cannot be maintained by a single shareholder acting in his individual capacity where his damages are slight and may be easily estimated and recovered in an action at law.

An action for such equitable relief must be brought, expressly and actually, in a representative capacity, and unless the plaintiff sues in behalf not merely of himself but of all other stockholders similarly situated, his complaint must be dismissed.

I.

It is a primary and fundamental rule of law that all persons interested in the result of an action must be made parties thereto.

This is a rule of substance in principle and not of form in practice. It is as ancient as a court of equity itself.

"In Mitford's Pleadings the author (afterwards Lord Redesdale) says, p. 163: "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit; to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation." And Lord Hardwicke said, in *Poole* v. *Clark*, (2 Atk., 515), that "if you draw the jurisdiction out of a court of law you must have all the persons before this court who will be necessary to make the determination complete and to quiet the question." In *Hawley* v. *Cramer* (4 Cow., 728), Walworth, Vice-Chancellor, held that the rule in equity for the joinder of all persons having an interest in the distribution of the fund or the subject matter of the suit was well settled, and that, "although there were exceptions to this rule, those exceptions are by way of excuse for not bringing all the parties in interest before the court. * * * The general rule, as sanctioned by the authorities, is, unquestionably, that all persons materially interested in the subject of the action and in the relief sought ought to be made parties. The Code of Civil Procedure, by its provisions, manifestly recognizes this principle, which, from so early a day in the history of equity jurisprudence, has been so essential a feature in equity procedure Section 446 provides for the joinder of "all persons having an interest in the subject of the action and in obtaining the judgment demanded."

Shepard *et al.* v. Manhattan R. Co. *et al.*, 117 N. Y., at 447, 448.

The only exception to this rule, either at common law or under the statutes of the State, applicable to the present case, is expressed in the closing sentence of section 448 of the Code of Civil Procedure.

"And where the question is one of a common, or "general interest of many persons: or where the "persons who might be made parties, are very nu- "merous, and it may be impractical to bring them "all before the court, one or more may sue or de- "fend for the benefit of all."

See Smith v. Swormstedt, 16 How., U. S., at 302.

There may be, indeed there are, many shareholders in the Brooklyn City Railroad Company who did not vote originally in favor of the lease sought to be annulled by this action, and who might agree with the plaintiff in his allegations of fact in respect to the manner in which the lease was brought about, but who, nevertheless, at the present time, insist upon the maintenance of the lease because it has proven beneficial in the largest degree to the revenues and property of the parent corporation. These shareholders have a right to be heard in this action, and unless they are made parties it is impossible for a court of equity fairly or fully to try the issues involved, or to arrive at a conclusive judgment in the case.

The plaintiff has not made his co-shareholders parties, and the only way in which he could have been excused for this fatal omission was by bringing his action expressly and actually in behalf of all others similarly interested with himself, and thereby securing the benefit of the exemption provided by the code and by the common law.

Having failed to put himself within the protection of this exemption he falls under the ban of the general rule.

II.

That an action for administrative relief by a shareholder against a corporation, respecting acts not ultra vires, cannot be maintained in equity except in a representative capacity, or where the plaintiff alleges in his complaint that the action is brought in behalf of other shareholders, similarly situated, is established by abundant authority, and is no longer open to discussion.

Graves v. Gouge, 69 N. Y., at 157.
Smith v. Swormstedt, 16 How., U. S., at 302.
Warth v. Radde, 28 How. Pr R., 230.
Smith v. Rathbun, 66 Barb., at 407.
Brinkerhoff v. Bostwick, 88 N. Y , at 60.
Gardner v. Pollard, 10 Bosworth, at 677.
Young v. Drake, 8 Hun, 61.
Cunningham v. Pells, 5 Paige, Chan. R., close of opinion, at 612, 613.
1 Morawetz on Pri. Cor., §240.
Boone on Cor., §150.

Says the Court of Appeals, Miller, J.: "There is no doubt that a stockholder has a remedy for losses sustained by the fraudulent acts and for the misapplication or waste of corporate funds and property by an officer of the corporation; but the weight of authority is in favor of the doctrine that an action for injuries caused by such misconduct must be brought in the name of the corporation unless such corporation or its officers, upon being applied to for such a purpose by such a stockholder, refuse to bring such action. In that contingency, and then only, can a stockholder bring an action for the benefit of himself and others similarly situated, and in such an action the corporation must necessarily be made a party defendant."

Greaves v. Gouge, *supra*, at 157.

"Where the shareholders are numerous, the suit may be brought by one or more in behalf of all. (*Butts v. Wood*, 37 N. Y., 317; *Robinson v. Smith*, 3 Paige, 222; *Hichens v. Congreve*, 4 Russ., 562; 8 Blatch., 347)."

Brinckerhoff v. Bostwick, *supra*, at 60.

III.

Even where a shareholder's action is brought in a representative capacity a court of equity will not grant administrative relief if his damages are slight, and may be easily ascertained and recovered in an action at law.

Thomas *v.* M. M. P. Union, 121 N. Y., at 51, 57.

Belden *v.* Burke, 147 N. Y., 542.

The statutes confide the management and control of the business of a railroad corporation to its directors, and courts do not sit to revise and direct their action at the suit of a single stockholder whose injury, if any, is open to legal redress in an individual action.

This rule arises necessarily from the fundamental doctrine that equity will not intervene where there is an adequate remedy at law.

The plaintiff's damages, upon his own showing, are comparitively insignificant. Taking them at the most extravagant construction of his complaint, the plaintiff's loss or damage amounts only to $250 year, or less than $4,000 in the aggregate and for all time.

The capital stock of the Brooklyn City Railroad Company consists of 1,200,000 shares at $10 a share, or $12,000,000 (fol. 14 case). Plaintiff owns 500 shares; in value $5,000 (fol. 15). He has received 10 per centum under the lease, and he states 15 per centum as the highest revenue presumable had not the lease been made (fols. 36, 37). The difference, or 5 per centum per annum, would be $250 a year.

If the plaintiff were given two hundred and fifty further shares of stock, which would earn $250 a year under the lease, he would be made whole, upon his own fanciful basis, and two hundred and fifty shares of the stock are of the nominal par value of $2,500 or the possible value of $4,000.

So that his capitalized damages, all told, would not amount to more than $4,000, out of transactions involving from $12,000,000 to $42,000,000.

IV.

The plaintiff's action having been brought by him individually and alone, it must be limited to a recovery of his own pecuniary losses or property damage. These he does not ask, but, on the contrary, persistently declined, and his complaint was, therefore, properly dismissed.

The rule stated is precisely the distinction upon which the case of Sage et al. v. Culver et al. was sustained (147 N. Y., 241).

In that case a lease, bond-issues and other transactions of a railway company, were assailed upon allegations far more forcible than those contained in the complaint in this action. The plaintiffs

sued alone and without setting forth that their action was brought in behalf of their co-shareholders similarly situated. The learned counsel for the defendants claimed this omission to be fatal, and cited the authorities, abundantly sustaining the rule that an action by a shareholder for administrative relief must be brought in a representative capacity. (See points of Gen. Wingate, 147 N. Y., at 243.) The plaintiffs escaped this impregnable proposition solely by virtue of the fact that the complaint did not seek administrative relief, but asked simply for the money due the plaintiffs or the pecuniary damage to their property. It did not ask the Court to review or disturb the acts of the corporation or its directors, but sought only for an accounting, to the end that the plaintiffs might have their share of monies wrongfully diverted from them by their co-shareholders who were in exclusive control of the corporation. (See points of Subscriber, 147 N. Y., at 244). Such an action in equity, like an action on a bond or note of a corporation at law, was always maintainable. (See authorities cited at p. 244, Sage case, *supra*.)

While the opinion of Judge O'Brien does not touch upon the point, an examination of the case will show that it was alone upheld upon this distinction, and is, therefore, an authority for the proposition that the action of a shareholder brought in his individual capacity must be limited to his individual pecuniary and property loss or damage, in support of which proposition ample authorities are cited by the respondent in the Sage case.

The truth is, the plaintiff's action, in the case at bar, was brought upon the theory that the lease could not be otherwise than profitable to the lessee—that he had nothing to lose and everything to gain—and estimating the profit at five per cent., the plaintiff need only go into court to receive it.

The outcome, however, was exactly the reverse. The lease, before the trial, had proven profitable to the lessor and burdensome in the heaviest degree to the lessee, and the plaintiff, unable to ask for any loss or damage to himself because none had occurred, still presumed to seek to set aside a lease, the continuance of which is now of the utmost value and importance to the parent corporation and all its stockholders.

V.

The plaintiff cannot escape the fatal objections to his complaint by the suggestion that while it does not expressly allege that the action is brought in behalf of himself and other shareholders similarly situated, the substance of its allegations and the nature of the relief demanded show it to be actually representative in character, because:

(1) A jurisdictional fact must be pleaded and cannot be inferred, and

(2) The plaintiff admitted upon the trial that he is the only complaining stockholder.

So that this Court in order to indulge the suggestion stated would have to infer a jurisdictional fact, not merely without any averment thereof in the complaint, but in direct contravention of the plaintiff's open declaration.

The fact, which was specifically stated upon the trial and fully admitted, that all the owners of the $12,000,000 of stock of the corporation had either authorized or approved the lease, and, after two years' experience thereunder, were favorable

thereto, and that the plaintiff alone complained thereof, left the plaintiff in the position of a single shareholder, out of a multitude, seeking, by the aid of a court of equity, to conduct the business and administer the affairs of a corporation, against the will of the other shareholders united, in matters clearly within the corporate powers.

VI.

Nor can the plaintiff derive any support from the authorities which favor jurisdiction in equity at the suit of a single shareholder for relief against the acts of a corporation which are ultra vires.

In the State of New York a railroad company has a right to lease its road under the Law of 1839 and various subsequent statutes.

The Railroad Law, 1878, ch. 565, Laws of 1890.

Woodruff v. Erie R. R. Co., 93 N. Y., 607.
Fisher v. Met. R'way Co., 34 Hun, 433.
Cent. R. R. Co. v. 23d St. R. R., 54 How., 168.
Fisher v. N. Y., &c., R. R., 46 N. Y., 644.
People v. Albany R. R., 77 Id., 232.
Troy R. R. Co. v. Boston R. R., 86 N. Y., 107.
People v. O'Brien, 45 Hun, 519.

The fact that more than two-thirds of the stockholders voted for the lease, and that the remainder, except the plaintiff, have since ratified or accepted it, leaves no doubt whatever as to the power of the corporation to make the lease, which the plaintiff seeks to annul. And it is respectfully submitted that no binding authority can be found where jurisdiction in equity has been entertained at the

suit of a single shareholder, acting in his individual capacity, where the matters complained of were within the corporate power.

It should be added further that an act of a corporation, voidable in character, can be ratified by a majority of the stockholders and must be disaffirmed by such majority within a reasonable time.

Hart v. Ogdensburg R. R. Co., 131 Official Reporter, Nov. 16, 1895.

Met. El. Ry. Co. v. Manhattan R'y Co., 14 Abb. N. C., 103.

VII.

A court of equity will not, at the suit of a shareholder, even when brought in a representative capacity, interfere against the acts of a majority of the shareholders and directors of a corporation, within the range of the powers of the corporation, unless it is made to appear that no one could have thus knowingly acted except from dishonest motives.

Gamble v. Q. C. W. Co., 123 N. Y. 91.

Durfee v. Old Colony R. R. Co., 5 Allen 242.

Hawes v. Oakland, 104 U. S., 450.

Beveridge v. N. Y. El. R. R. Co., 112 N. Y., 1.

Morawetz on Pri. Cor., § 477.

Northwestern Transportation v. Beatty, Law Rep., 12 Appeal cases, 589.

Farmers' L. & T. Co. v. Toledo, &c., R. R. Co., 54 Fed. Rep., 759.

Hart v. Ogdensburg R. R. Co., 131 Official Reporter, November 16, 1895.

In Gamble v. Q. C. W. Co. *supra*, at 98-99, the Court of Appeals, Peckham, J., says: "I think that where the action of the majority is plainly a fraud upon, or, in other words, is really oppressive to the minority shareholders, and the directors or trustees have acted with and formed part of the majority, an action may be sustained by one of the minority shareholders suing in his own behalf, and in that of all others coming in, etc., to enjoin the action contemplated, and in which the corporation should be made a party defendant. It is not, however, every question of mere administration or of policy in which there is a difference of opinion among the shareholders that enables the minority to claim that the action of the majority is oppressive, and which justifies the minority in coming to a court of equity to obtain relief. Generally, the rule must be that in such cases the will of the majority shall govern. The Court would not be justified in interfering even in doubtful cases, where the action of the majority might be susceptible of different constructions. To warrant the interposition of the Court in favor of the minority shareholders in a corporation or joint stock association, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company, and in a manner inconsistent with its interests. Otherwise the Court might be called upon to balance probabilities of profitable results to arise from the carrying out of the one or the other of different plans proposed by or on behalf of different shareholders in a corporation, and to decree the adoption of that line of policy which seemed to it to promise the best results, or at least to enjoin the

carrying out of the opposite policy. This is no business for any court to follow."

Strange to say! the plaintiff, by annexing to his complaint the statement issued by the Board of Directors to the stockholders of the company, showed that the nature of the lease proposed and the entire plan and scheme with which it was connected, about which he complains, were fully known in whole and in detail by the stockholders, when, according to the admission his counsel made upon the trial, it was approved by more than a two-third vote; and farther still, it is conceded that, after the lease had been perfected and the entire plan put into full operation, so unanimous were all the shareholders and parties in interest in favor of the lease, that the plaintiff alone complains of it.

Under these circumstances it is respectfully submitted, upon the authority above quoted from Judge Peckham, it was not for the Special Term to interfere.

POINT SECOND.

The complaint is not maintainable in the absence of an allegation that the plaintiff had made a demand upon the Board of Directors of the Brooklyn City Railroad Company to bring an action to annul the lease, or such an action as he himself has brought, and that the Board of Directors had refused.

Leslie v. Lorillard et al., 31 Hun, 305.
Memphis v. Dean, 8 Wall (U. S. R.), 73.
Greaves v. Gouge, 69 N. Y., 71.
Hawes v. Oakland, 104 U. S., at pp. 460–1-2.

The lease was executed February 15, 1893, (folio 31). The plaintiff's action was begun June 1, 1894, (folio 7). The complaint does not afford the slightest ground for a finding that the directors of the Brooklyn City Railroad Company in office at the time of the commencement of this action were in any way inculpated in any of the fraudulent or wrongful acts of which the plaintiff complains. In point of fact, they had no connection whatever therewith. The plaintiff, therefore, was bound to fully comply with the rule requiring a demand and refusal.

An examination of the allegations of the complaint respecting such a demand and refusal, to be found at folios 38, 39 and 40, will show them to be utterly insufficient under the rule laid down by the authorities above cited.

The plaintiff does not directly allege a demand or request that the directors should bring a suit, such as he has brought, to annul the lease; and, while he indirectly alleges that the "directors and officers have failed and neglected to take any proceedings toward the annulling of said lease or agreement," he plainly fails to allege a refusal within the requirements of the rule, as expounded by the authorities last cited, even if such a demand were made.

POINT THIRD.

Upon the foregoing points and authorities the judgment of the Special Term must be affirmed with costs.

WILLIAM C. TRULL,
Attorney for Brooklyn
City R. R. Co.,
Respondent.

WILLIAM C. DEWITT,
Of Counsel.

3

New York Supreme Court,

SECOND DEPARTMENT—APPELLATE DIVISION.

PATRICK H. FLYNN,
Appellant,

against

THE BROOKLYN CITY RAILROAD COMPANY and the BROOKLYN HEIGHTS RAILROAD COMPANY,
Respondents.

Brief for the Respondent The Brooklyn Heights Railroad Company.

STATEMENT.

This action was commenced in the City Court of Brooklyn on June 1st, 1894.

The complaint alleged the incorporation of the defendants as street surface railroad companies in the City of Brooklyn and the adjoining towns in Kings and Queens Counties.

That franchises were possessed by The Brooklyn City Railroad Company to build and extend its lines upon many other streets in said city and Counties.

That The Brooklyn City Road owned much valuable real estate consisting of depots and other structures and possessed a large number of cars and other appurtenances for the complete operation of its railroad.

That its capital stock was nine million dollars, afterwards increased to twelve million dollars, all paid in.

That for many years said company had regularly declared dividends, at least eight per cent. upon the capital stock of nine million dollars.

That plaintiff is the owner of five hundred shares of the capital stock of the Brooklyn City Railroad Company, which about the month of January, 1892, had received proper consents to operate its railroad by electricity, and was engaged at that time in equipping its railroad by electric-motor power, having purchased a large number of electric cars and other equipments, and acquired land for power stations.

That the value of the real estate and franchises of the Brooklyn City Railroad Company, prior to February 15th, 1893, was the sum of thirty million dollars and upwards, and that said company was in a position to procure all the funds necessary to properly equip its road by electricity.

That by the more profitable operation of its road by electricity than by horses the company is in a position to increase its earnings, to pay dividends to its stockholders in excess of ten per cent., and that its profits would largely increase in the future.

That prior to February 15th, 1893, certain persons, some of whom were directors of the Brooklyn City Railroad Company, designed a scheme to divert a portion of the earnings of the company from its stockholders, and in pursuance of that scheme it was planned that the railroad and franchises of the company should be leased to another company for a consideration less than the actual rental value thereof, and that a controlling interest in the stock of said other company should be owned by the said certain persons, and not by the stockholders of the Brooklyn City Railroad Company, and that the difference between the actual rental value of the said railroad and fran-

chises and the rental paid under the proposed lease would thus enure to the profit of the stockholders of the said other company, and not to the profit of the stockholders of the Brooklyn City Railroad Company (fols. 20 to 23).

That in pursuance of this scheme said certain persons purchased stock of the Brooklyn City Railroad Company to acquire a controlling interest therein, in order to make the said lease (fol. 22).

That on January 6th, 1893, in pursuance of the scheme, said persons caused to be issued to the stockholders the proposition contained in Exhibit A, annexed to the complaint (fols. 22 and 44 to 54).

That the Brooklyn Heights Railroad Company operates a railroad in Montague Street about half a mile in length.

That the said certain persons had at the time of said statement control of the said Brooklyn Heights Railroad Company (fol. 24).

That on February 15th, 1893, its bonded indebtedness was $250,000 and its capital stock $200,000, and the value of said stock did not exceed fifty per cent. of its face value. That the railroad was not a profitable road, and all its property and value did not exceed $350,000 in value (fols. 25 and 26).

That to carry out the scheme it was intended to transfer stock of the Brooklyn Heights Railroad Company to a foreign corporation called the "Traction Company," a portion of whose stock was to be allotted to such stockholders of the Brooklyn City Railroad Company as might subscribe and pay therefor, the remainder being reserved by the said certain persons for their own use, and thereby in effect to lease the property of the Brooklyn City Railroad Company to said foreign corporation and to divert a portion of the earnings of its railroad from its stockholders to the said certain persons (fols. 27 and 28).

That by the statement, Exhibit A, it was in-

tended to convey the impression that the proposed lease of the railroad and property of The Brooklyn City Railroad Company was to be made to a company with a capital stock of thirty million dollars; whereas, in fact, no street surface railroad corporation with a capital approaching that sum had been incorporated in the State of New York, to which the railroad of The Brooklyn City Railroad Company could be lawfully leased, but, on the contrary, it was in fact intended to lease said railroad and property to the Brooklyn Heights Railroad Company, which was incapable of paying a dividend of ten per cent. upon the stock of The Brooklyn City Railroad Company otherwise than from the proceeds of operating the railroad under the lease (fols. 28 and 29).

That this scheme of lease was unlawful, the effect and intent thereof on the part of the shareholders of The Brooklyn City Railroad Company, who designed, approved and carried the same into effect, being to injure and defraud the stockholders of said company (fol. 30).

That in pursuance of the scheme the said lease was executed on the part of the Board of Directors of both said railroad companies, and that it is claimed on the part of the defendants that at a meeting of the stockholders of The Brooklyn City Railroad Company held on the 15th day of February, 1893, the lease was ratified and approved by the stockholders owning two-thirds of the stock of The Brooklyn City Railroad Company; "whereas, as the plaintiff is informed and believes, said lease was not so ratified and approved" (fol. 31).

(Upon the opening of the cause counsel admitted that the approval of the stockholders was duly obtained.)

That on June 6th, 1893, The Brooklyn City Railroad Company delivered to the Brooklyn Heights Railroad Company possession of all of said railroad property and franchises (fol. 32).

That a foreign corporation, known as The Long

Island Traction Company, was organized with a capital stock of thirty million dollars, which became the owner of the entire capital stock of the Brooklyn Heights Railroad Company, 270,000 shares of which, "par value $100," were allotted to the stockholders of The Brooklyn City Railroad Company, at $15 a share, in the proportion of three shares of the stock of the Traction Company for every ten shares of The Brooklyn City Railroad Company, the remaining thirty thousand shares being reserved by certain persons shareholders of The Brooklyn City Railroad Company, who approved said lease, for their own use and benefit (fols. 31 to 34).

That the privilege of permitting the stockholders of The Brooklyn City Railroad Company to purchase stock of said Traction Company was not a compensation to such stockholders for the injury they would receive through the lease.

That by the said plan The Brooklyn City Railroad Company stockholders were prevented from receiving the full amount of the stock of the Traction Company, and were unjustly and fraudulently deprived of three million dollars in par value thereof, and a corresponding portion of the earnings of said Traction Company (fols. 34 and 35).

That the Traction Company's stock is of no value except by reason of the lease, and that the stockholders of The Brooklyn City Railroad Company are entitled to the full amount of the earnings of their railroad (fols. 35 and 36).

That the Brooklyn City Railroad Company is able to pay a dividend of at least 15 per cent. on its present capital stock and by said lease the stockholders have been deprived of said increase in dividends, besides the benefit and advantage consequent upon the certain constant increase in the value of the franchises and property of The Brooklyn City Railroad Company through the extension of its road and increase in travel thereon

due to the growth of the city from year to year (fols. 36 and 37).

That the plaintiff, at divers times since the execution of the lease, duly demanded of The Brooklyn City Railroad Company, its officers and directors, as a stockholder in said The Brooklyn City Railroad Company, his share of the proceeds of the operation of the railroad over and above the ten per cent. paid to him under the lease, but that the defendant The Brooklyn City Railroad Company has refused and neglected to pay plaintiff said portion of said proceeds (fol. 38).

That the plaintiff from time to time has notified the directors and officers of The Brooklyn City Railroad Company that the leasing aforesaid was unlawful and to the injury of its stockholders, and has demanded that there shall be distributed among said stockholders all profits and receipts arising from the operation of the railroad as the same may accrue, without regard to the lease, "and that such distribution necessarily involved such action on the part of said officers and directors as would effect the annulling of said lease, but that said directors and officers have failed and neglected to take any proceedings toward the annulling of said lease or agreement" (fols. 39 and 40).

Plaintiff demanded judgment:

FIRST.—That the said lease between The Brooklyn City Railroad Company and the Brooklyn Heights Railroad Company be declared null and void and that the same be set aside, so that it would have no further force and effect (fol. 40).

SECOND.—That the Brooklyn Heights Railroad Company be directed to transfer and deliver to The Brooklyn City Railroad Company all the property and assets of the lessor (fol. 41).

THIRD.—That the Brooklyn Heights Railroad Company be directed to account for all moneys received by it from the operation of said The Brook-

lyn City Railroad Company and that it be directed to pay over to The Brooklyn City Railroad Company all moneys so acquired by it (fol. 42).

FOURTH.—That the plaintiff have such other and further relief as might be just, besides the costs of the action (fol. 42).

Exhibit A annexed to the complaint is a full statement made to the stockholders of The Brooklyn City Railroad Company under date of January 6th, 1893, by the Board of Directors of The Brooklyn City Railroad Company of the plan set out in the complaint, with a statement that the Board of Directors were unanimously of the opinion that the proposition was a most favorable one and unhesitatingly recommended it to the stockholders of the company (fol. 52).

Upon the case coming on for trial the counsel for the plaintiff opened the case, and claimed that by means of the alleged fraudulent scheme set forth in the complaint the votes of the holders of more than two-thirds of the defendant The Brooklyn City Railroad Company had been given in approval of the lease therein set forth, *and admitted that such vote had been given*, that the plaintiff was the only complaining stockholder, and that the gravamen of this action is that the said lease is a violation of the duties of the directors of The Brooklyn City Railroad Company and a fraud upon the said company, the corporation for the benefit of whose stockholders the plaintiff claimed to bring this action in a representative capacity.

The defendants thereupon respectively by their counsel moved, on the said admissions and statements in said opening and upon the complaint for a dismissal of the complaint, as not stating facts sufficient to constitute a cause of action.

The motion was granted, and the complaint in the action was dismissed, with costs to each of the defendants, and judgment was directed to be entered accordingly.

These admissions and statements of the plaintiff's counsel in his opening were duly embodied in the order which was entered on the 2d day of March, 1896, dismissing the complaint (fols. 113 to 118), and formal judgment was entered and the same admissions and statements were embodied in said judgment (fols. 120 to 125).

The plaintiff thereupon appealed from the said judgment (fol. 128).

The opinion of the learned trial Justice in dismissing the complaint is found at fols. 131 to 135.

The complaint was dismissed upon the following grounds:

First.—That it did not allege a demand by plaintiff on The Brooklyn City Railroad Company to bring an action to cancel and annul the lease to the Brooklyn Heights Railroad Company and its refusal so to do.

Second.—That said demand was not shown to be unnecessary, because it did not appear from the complaint that the parties whose acts are complained of as fraudulent were in control of the corporation at the time of the commencement of the action.

Third.—That there was nothing in the complaint which would justify the plaintiff in maintaining the action in his own name and for his own benefit to obtain the relief which he asks in his prayer for judgment.

Summary.

Before entering upon the discussion of the questions of law involved upon this appeal, we desire to summarize briefly the propositions hereinafter more fully set forth, to wit:

I.

That this is not an action for individual relief. There are no allegations appropriate to such relief.

Such relief could be obtained in an action at law. The complaint asks only for administrative relief by vacating the lease. No relief could be granted other than a general result which would affect both the corporation and all the stockholders. The complaint must be sustained, if at all, as setting forth a cause of action for vacating the lease.

II.

A complaint seeking administrative relief, brought by a stockholder on behalf of a corporation, must contain the following allegations:

(*A*) That the stockholder complaining sues in behalf of himself and all others who may elect to make themselves parties to the suit.

(*B*) That he has demanded of the board of directors that the corporation bring a suit, and that the board has neglected and refused to bring it.

(*C*) That the suit was brought within a reasonable time, so that the plaintiff is free from the imputation of laches and acquiescence.

As an alternative to (*B*) the complaint may show

(*B1*) That the officers and directors who carried out the transactions complained of and were then in control of the corporation, are at the time of filing the complaint, still in control, so that such a demand would be a vain and idle thing.

FIRST POINT.

This is a suit in equity, brought solely to obtain administrative relief. No personal relief is sought by the plaintiff.

The plaintiff does not seek any judgment in favor of himself as an individual; the complaint asks only for administrative relief, vacating the

lease. It is unquestionable that if the plaintiff has suffered any special grievance and injury, he, as an individual, may bring an action for the damages incurred, but this is not such an action. Such relief could be granted in an action at law, rendering recourse to a court of equity unnecessary. Here the plaintiff comes to a court of equity, and the complaint contains no allegations appropriate to individual relief. The prayer for relief is for a cancellation of the lease, and this general result would affect the corporation and all other stockholders, even though the latter are not parties and do not consent to or desire such a result. The language of the prayer for judgment is as follows:

> "Wherefore, this plaintiff demands judgment against the defendant that the said lease or agreement between the Brooklyn City Railroad Company and the Brooklyn Heights Railroad Company be declared null and void, and that the same be set aside so that it will have no further force and effect, and that the defendant the Brooklyn Heights Railroad Company be directed to transfer and deliver to the Brooklyn City Railroad Company all the property and assets, whether real or personal, of the said Brooklyn City Railroad Company in the possession of the said Brooklyn Heights Railroad Company.
>
> "And that said defendant the Brooklyn Heights Railroad Company be directed to account for all moneys received by it from the operation of said Brooklyn City Railroad Company, and that it be directed to pay over to the Brooklyn City Railroad Company all moneys so acquired by it, and that the plaintiff have such other and further relief as may be just, besides the costs of this action."

This question arises precisely as if on a demurrer, and the prayer for relief can be referred to for the purpose of ascertaining the scope and character of the action.

Swart *vs.* Boughton, 35 Hun, 281 at 285.

Edson *vs.* Girvan, 29 Hun, 422 at 424.
Rogers *vs.* Rogers, 75 Hun, 133 at 137.

No relief upon a demurrer being overruled can be given other than that asked in the complaint.

Swart *vs.* Boughton, *supra.*
Briggs *vs.* Oliver, 68 N. Y., 336.
Simonson *vs.* Blake, 12 Abb., 331.

In this complaint there is no prayer for relief for the plaintiff as an individual stockholder for injury to his property.

It clearly appears from the complaint that no personal judgment is sought, but general administrative relief, and the complaint must be sustained, if at all, as showing a cause of action for such administrative relief, not for individual relief to the plaintiff.

SECOND POINT.

The complaint is defective in that the plaintiff sues in an individual capacity for administrative relief; and further that he does not sue in behalf of himself and all others who might elect to make themselves parties to the suit.

As already shown, this is an action where only administrative relief is sought; such a suit can be maintained only by the corporation or by a stockholder suing in behalf of himself and of all other stockholders who may elect to make themselves parties to the suit.

I.

This is a suit in which the alleged cause of action exists, if at all, only in favor of the corporation, the Brooklyn City Railroad Company, and therefore that corporation is the proper person to bring the suit.

Gardner *vs.* Pollard, 10 Bosw. (N. Y.), 674, 677.
Allen *vs.* Curtis, 26 Conn., 455, 460.
Robinson *vs.* Smith, 3 Paige, 222, 232, at end.
Greaves *vs.* Gouge, 69 N. Y., 154, 157.

Gardner vs. *Pollard*, 10 Bosw., 674, holds that a stockholder of a corporation cannot, in an action for damages against the directors whom he alleges have fraudulently applied the property of the corporation and thereby rendered his stock valueless, recover for any damage which consists solely of his loss of the share of the assets.

At page 677, the Court says:

> "The corporation is the only party that can properly sue. If it refuse, then a stockholder on allegation of that fact, may sue on behalf of himself and other stockholders and make the corporation party defendant."

And again, at page 691:

> "I cannot doubt, therefore, that this complaint is defective * * * * in not alleging special damage to the plaintiff by the defendant's acts beyond that inflicted on the corporation and indirectly on all the stockholders jointly."

Allen vs. *Curtis*, 26 Conn., 455, although not a New York case, is frequently cited in New York reports as a leading authority for the proposition that an individual stockholder as such cannot maintain an action against the directors for mismanagement or defrauding the corporation, the decision resting upon the ground that such direc-

tors are the agents of the corporation and accountable only to the corporation.

In the opinion, at page 460, the Court says:

> "The Woodbury Bank should have brought this suit. It is *its* property which has been misappropriated and lost, and the damages to be recovered belong to it—to be sure, in trust for bill-holders, depositors and other creditors, if any there be, and finally for the stockholders, but for all of them and not for some of them exclusively."

Robinson vs. *Smith*, 3 Paige, 222, holds that where stockholders bring an action against the directors for fraud and mismanagement, by which the property of the corporation is dissipated, that not only is the corporation a necessary party, either as complainant or defendant, but that a suit to compel the directors to account for the loss should be in the name of the corporation, unless it appears that the directors of the corporation refuse to prosecute such suit, or the present directors of the company are the parties who have made themselves answerable for the loss.

Then, in the opinion, the Court says:

> "Generally, where there has been a waste or misapplication of the corporate funds by the officers or agents of the company, a suit to compel them to account for such waste or misapplication, should be in the name of the corporation."

II.

Under certain circumstances an individual stockholder may sue in equity, but only when he sues in behalf of himself and other stockholders, and this must appear upon the face of the complaint.

(1) The authorities are numerous that such an action can only be maintained if brought in behalf of all other stockholders similarly situated.

N. Y. Code Civil Procedure, § 448.

Allen *vs.* Curtis (*supra*).

Gardner *vs.* Pollard (*supra*).
Wells *vs.* Jewett, 11 How. Pr., 242, 246.
Hichens *vs.* Congreve, 4 Russ., 562 (Eng.).
Greaves *vs.* Gouge, 69 N. Y., 154, 157.
Gray *vs.* N. Y. & Va. S.S. Co., 5 Thompson & Cook (N. Y.), 224, at pages 227 and 228.
Robinson *vs.* Smith, 3 Paige Chan., 221, 233.
Brinkerhoff *vs.* Bostwick, 88 N. Y., 52, 60.
Smith *vs.* Swormstedt, 16 How. (U. S.), 288, 302.
Smith *vs.* Hurd, 12 Metc., 371, 386.

(2) Where such an action is brought it must appear upon the face of the complaint that it is brought in behalf of the other stockholders also. If this does not appear the defect is fatal to the pleading.

Wood vs. *Draper*, 4 Abb. Pr., 322, holds that the Court will grant relief at the suit of a corporator having an interest in the corporate property on a complaint showing an illegal diversion or application of the corporate property, but a corporator who sues as such must aver in his complaint that he sues in his own behalf and also in behalf of all others similarly interested, &c.

In the opinion the Judge says, at page 330:

> "The rule in reference to the proper and necessary parties is that all must be made parties who have an interest in the result. When, however, a great many individuals are interested the Court will often permit a few to represent the whole, but the bill should expressly state that it was filed as well on behalf of other members as those who are really made complainants."

And again, at page 332:

> "I am satisfied that the weight of authority is entirely with the proposition that a plaintiff who seeks the aid of a court of equity in a case like the present must aver that he files his complaint not only on his own behalf, but that of others similarly situated. *Such an averment is essential* to a complete determination of all the rights affected by the suit."

Louis vs. *Belgard*, 43 St. Rep., 766 (Supreme Ct., Gen. T., 1st Dept.). This was an action brought by a creditor of a deceased insolvent debtor to set aside transfers of property made by the deceased, then alleged to have been fraudulent. The plaintiff sued individually, and not in behalf of himself and the other creditors, and it was therefore held that the complaint did not state facts sufficient to constitute a cause of action.

The Court, per Van Brunt, *J.*, said:

> "An action by a creditor at large of a deceased insolvent debtor, to set aside fraudulent transfers of property by the deceased, can only be maintained by such creditor for the benefit of himself and other creditors interested in the estate or property of such deceased debtor, and therefore unless it appears on the face of the complaint that the action is being so prosecuted, no cause of action is set up.
>
> "The complaint in the case at bar shows no allegation or statement that it is so brought. It is true that in the title of the action these words appear, but there is nowhere any statement of an action so brought, and it seems to us that *this must appear as distinctly as any of the other averments.*

3. That the relief demanded is such as cannot be granted except to a person suing in a representative capacity is in no case a sufficient allegation that the plaintiff sues in that character, and not in his individual behalf.

Thus, in *Gould* vs. *Glass* (19 Barb., 179, 184), a complaint demanding judgment for a penalty given only to commissioners of highways was held bad, for not also alleging that the plaintiffs were such commissioners.

THIRD POINT.

The complaint is further defective in that it fails to allege demand by the plaintiff upon the corporation to bring an action and refusal of the corporation to comply with such demand.

I.

The complaint is absolutely bare of any such allegation.

The only allegations of demand in the complaint are found in Paragraphs XXIX. and XXX.:

> "XXIX.—That this plaintiff at divers times since the execution of said lease duly demanded of the Brooklyn City Railroad Company, its officers and directors, as a stockholder in said Brooklyn City Railroad Company, his share of the proceeds of the operation of the railroad of said railroad company over and above the ten per cent. paid to him under said lease, but that the said defendant The Brooklyn City Railroad Company has refused and neglected to pay the plaintiff his said portion of said proceeds to which he was legally and properly entitled.
>
> XXX.—That the plaintiff herein has from time to time notified the directors and officers of said Brooklyn City Railroad Company that the leasing aforesaid of the railroad and property of said company was unlawful and to the injury of the stockholders of said company,

> and has demanded that there shall be distributed among the stockholders of said company, all the profits and receipts arising from the operation of said railroad, and of said property as the same may accrue, without regard to the said lease, and that such distribution necessarily involved such action on the part of said officers and directors as would effect the annulling of said lease, but that said directors and officers have failed and neglected to take any proceedings toward the annulling of said lease or agreement."

It is idle for plaintiff to say that because he demanded an undeclared dividend he had demanded that The Brooklyn City Railroad Company should institute legal proceedings to set aside a lease made with all the solemnities provided by statute.

This was a demand for the damages that plaintiff conceived had been done to his individual interests by the lease complained of. His demand might have been complied with without any cancellation of the lease or receipt by the Brooklyn City Railroad Company of all the proceeds, if any, over said ten per centum. This demand was not one for the relief demanded in this complaint, and was not inconsistent with a continuance of the lease as to the two corporations interested and all stockholders of the Brooklyn City Railroad Company, except the plaintiff. In addition plaintiff does not allege as matter of fact that the lines of the Brooklyn City Company did in fact earn more than the ten per centum, only that they ought to earn more if properly managed. Therefore the refusal of the directors of the Brooklyn City Company to pay an excess over ten per centum which is not shown to have been received by them or even to exist, and which if received and paid would represent only plaintiff's individual damages, cannot be construed as a refusal to bring a suit to set aside a lease alleged to have been fraudulently entered into.

Conceding to Paragraph XXIX. of the complaint all the force that it can possibly carry, it is

impossible to construe a demand of payment such as is there described, as the demand which is necessary as a condition precedent to the right of a stockholder to institute a suit in behalf of this corporation.

The absence of the necessary demand is not cured by the allegations of Paragraph XXX. These are still further from furnishing a substitute. Paragraph XXIX. refers to alleged profits already earned. Paragraph XXX. refers to prospective profits, and the alleged demand is that they *shall be* distributed "as the same may accrue." It is not alleged that this demand was refused nor even that such profits had accrued prior to the commencement of the action.

II.

The necessity of such a demand.

This is clearly established by the authorities:

Gardiner *vs.* Pollard, 10 Bostwick, 674, at 677.
Greaves *vs.* Gouge, 69 N. Y., 154.
Leslie *vs.* Lorillard, 31 Hun, 306.
Hawes *vs.* Oakland, 104 U. S., 450, at 461.
Farrow *vs.* Holland T. Co., 74 Hun, 585, at 602.
Lindheim *vs.* Man. Ry. Co., 52 St. R., 34.
Smith *vs.* Rathbun, 66 Barb., 402, at 407.
Brinckerhoff *vs.* Bostwick, 88 N. Y., 52, at 59.

Gardiner vs. *Pollard*, 10 Bostwick, 674, was an action brought by an individual stockholder based upon an alleged conspiracy by the directors of the corporation to defraud the stockholders thereof. The Court, at 676, said:

"There are several adjudged cases to the

effect that the corporation is a necessary party (citing 3 Paige, 232; 5 Paige, 607; 26 Conn., 456; 19 Pick., 155; 12 Metc., 371; 16 Maine, 314; 24 Maine, 9). These decisions proceed on the principle that all the monies misappropriated by Pollard, whether gross proceeds or net income, were the monies of the corporation, and the damage caused by the misconduct is primarily and directly caused to the corporation. The defendants are liable to the corporation and the latter can recover therefor, and is the only party having at common law any right of action by reason of the premises. * * * The corporation is the only party that can properly sue. *If it refuse, then a stockholder on allegation of that fact may sue on behalf of himself and other stockholders and make the corporation a party defendant.* This complaint is defective in substance, in that the suit is neither brought by the corporation nor is it made a defendant on an allegation showing the necessity therefor."

Greaves vs. *Gouge*, 69 N. Y., 154, was an action brought by an individual stockholder suing in behalf of himself and other stockholders, and based upon an alleged fraudulent combination on the part of the officers of the company, but not containing any allegation of or request to sue and refusal. The Court said:

"There is no doubt that a stockholder has a remedy for losses sustained by the fraudulent acts and for the misapplication or waste of corporate funds and property by an officer of a corporation, but the weight of authority is in favor of the doctrine that an action for injuries caused by such misconduct must be brought in the name of the corporation unless such corporation or its officers, upon being applied to for such a purpose by a stockholder, refuse to bring such action. In that contingency, *and then only*, can a stockholder bring an action for the benefit of himself and others similarly situated, and in such an actien the

> corporation must necessarily be made a party defendant. When a stockholder brings such an action *the complaint should allege that the corporation on being applied to refused to prosecute, and as this averment constitutes an essential element of the cause of action, the complaint is defective and insufficient without it.*"

Leslie vs. *Lorillard*, 31 Hun, 303. This was an action brought by a stockholder in behalf of himself and other stockholders similarly situated. The complaint was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action, and the question arose as to whether the omission of an allegation that the corporation had refused to prosecute an action was fatal upon such demurrer. The allegation was plain upon this point and was as follows (page 306):

> "That heretofore and before the commencement of this action the plaintiff requested the defendant, the Old Dominion Steamship Company of Delaware, to pay no more money to said Jacob Lorillard or his assigns under said contract marked B and to commence an action to procure the cancellation of said contract and to recover from said Jacob Lorillard all sums of money paid to him under the same and under the contract as herein mentioned. That said defendant *has neglected* to bring such action and threatens to continue to make the monthly payments provided in said contract."

The Court held that this was *not* a sufficient statement of a refusal on the part of the corporation, and in its opinion said (p. 306):

> "The allegation that the defendant *has neglected* to bring such action is not equivalent to an allegation that the defendant *has refused* so to do. It is not stated how long such neglect continued, whether for a day, a month, a year or any other time, and there is nothing from which the Court can lawfully infer that such neglect is equivalent to a refusal. *A*

refusal of the Board of Directors in such a case is essential in order to give the stockholder standing in court as the charter confers upon the directors the general management of the business of the company. 'There must be a clear default therefore on their part involving a breach of duty'" (citing 8 Wallace, 73).

III.

No facts appear in the complaint which relieve the plaintiff from the necessity of making such demand.

There may be cases where the facts are such as to make a demand useless, and on the general principle that the law will not require a person to do a vain and useless thing, the plaintiff in such a case would not be required to make a demand certain to be fruitless.

Such a case would exist if it appeared that the scheme alleged in the complaint was a fraudulent plan upon the part of the directors of the Brooklyn City Railroad Company to injure the plaintiff, and that the same directors had continued in office up to the time that this action was brought.

Butts *vs.* Wood, 37 N. Y., 317.
Brinckerhoff *vs.* Bothwick, 88 N. Y., 52, at 59.
Young *vs.* Drake, 8 Hun, 61.
Sheridan *vs.* S. E. L. Co., 38 Hun, 396.
Sage *vs.* Culver, 147 N. Y., 241, at 247.

The plaintiff would not be relieved from the necessity of making such a demand unless the complaint alleged

(1.) That such a conspiracy had actually existed, and further,

(2.) That the composition of the board had not been changed.

Neither of these facts appear.

(1.) It does not appear that the Board of Directors or the officers of the corporation at any time

conspired or joined in a fraudulent contrivance to injure the plaintiff. Plaintiff's only allegation is that "certain persons, some of whom were directors of said company" (fol. 20), entered into a scheme to divert a portion of the earnings of the company from the stockholders. It is not stated who were the alleged schemers upon the board of the Brooklyn City Railroad Company, nor that they were in the majority, nor that they included in their number any officer of the company. There is no presumption in favor of the plaintiff that the officers or directors of the corporation were false to their trusts, and no broader construction can be given to the pleading than the words necessarily bear. It is not alleged and cannot be presumed that the conspirators were a majority of the board.

(2.) It does not appear from the complaint that the composition of the board remained the same at the time of filing the complaint that it was at the time of the vote upon the lease. More than a year had elapsed since that time, and it must be presumed that there has been an election for directors in the meantime, consequently no presumption can arise that the directors were the same as those who made the lease.

There is nothing alleged in this complaint which relieves the plaintiff from the necessity of making demand.

Even a refusal to be made plaintiffs in the action is not sufficient to excuse demand, as the corporation has the right to select its own attorneys. It must be a *refusal* to institute legal proceedings.

Lindheim *vs.* Man. Ry. Co., 52 St. Rep., 34.

FOURTH POINT.

The complaint does not show a state of facts which would justify interfering with the internal administration and management of the corporation.

The general principle is well established that the stockholders are bound by the acts of the corporation performed by its duly authorized agents and that the Courts will not interfere at the instance of a dissenting minority stockholder. The principle is well stated in the following case:

> *Durfee* vs. *Old Colony R.R. Co.*, 5 Allen (Mass.), 242.
>
> "It may be stated as an indisputable proposition that every person who becomes a member of a corporation aggregate by purchasing and holding shares agrees by necessary implication that he will be bound by all acts and proceedings within the scope of the powers and authority conferred by the Charter which shall be adopted or sanctioned by a vote of a majority of the corporation duly taken and ascertained according to law. This is the unavoidable result of a fundamental principle that the majority of the stockholders can regulate and control the lawful exercise of the powers conferred on a corporation by its charter."

The cause of action alleged in the present case is one which, if it existed at all, would exist in behalf of the corporation, the Brooklyn City Railroad Company, and not in favor of the plaintiff. It is claimed that the lease to the Brooklyn Heights Railroad Company was improperly made and should be cancelled. It is true that if certain facts exist, the plaintiff may properly maintain an action such as the present one, but it is incumbent on him to allege clearly that such facts exist. He cannot maintain a suit upon a cause of action accruing to

another party except under certain very special circumstances.

In *Hawes* vs. *Oakland*, 104 U. S., at p. 456, the following language of the Court in MacDougall *vs.* Gardiner (1 Ch. D., 13) is cited as authority:

> "I think it is of the utmost importance in all these controversies that the rule which is well known in this Court as the rule in Mozley *vs.* Alston, and Lord *vs.* Copper Miner's Company, and Foss *vs.* Harbottle should always be adhered to; that is to say, that nothing connected with internal disputes between shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive or fraudulent; unless there is something *ultra vires* on the part of the company *qua* company, or on the part of the majority of the company, so that they are not fit persons to determine it, but that every litigation must be in the name of the company if the company really desire it."

And again, at page 460, the Court lays down the following general principles:

> "We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—
>
> Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;
>
> Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;
>
> Or where the board of directors, or a major-

ity of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a Court of Equity."

The instances in which a stockholder may bring an action in the place of a corporation may be summarized as follows:

1. Where the action on the part of the directors or stockholders is *ultra vires*.

2. Where the action on the part of the directors or stockholders is in pursuance of a fraudulent scheme designed to injure the other stockholders.

3. Where a majority of the Board of Directors receive personal advantages to the destruction of the corporation or rights of other stockholders.

4. Where the acts of the majority stockholders are unlawfully oppressive to the minority.

I.

ULTRA VIRES.—The lease sought to be set aside is in no respect invalid on the ground of *ultra vires*, and all legal requirements were complied with in its execution.

The action of the directors and stockholders of the Brooklyn City Railroad in leasing their property and franchises to another road was not an act *ultra vires*, but was simply the exercise of a right which has long been recognized as existing in the officers of a corporation. In the absence of a statute making the consent of the stockholders, or a majority of them, a condition precedent to the validity of such a lease, it is a matter which rests within the discretion of the directors, and a lease

of the road might be made by them, not only without the sanction, but even it appears without the knowledge of the stockholders, though in point of fact, as a matter of policy and expediency, the latter would always be given an opportunity to express their views.

That this is the well established rule is stated in *Beveridge* vs. *N. Y. E. R. Co.*, 112 N. Y., 1.

In this case the Court, in passing upon the validity of certain leases made by the New York and Metropolitan Elevated Railroad Companies to the Manhattan Railway Company, said (page 21):

> "As a matter of fact conceded in the case, the lease of 1879 received the assent of the New York Company's stockholders; but we do not think the concurrence of stockholders to be an essential condition to the validity of a lease by a railroad corporation of its road to another railroad corporation. The Act of 1839 has more than once been construed to authorize such a lease. The power therein conferred upon a railroad corporation to contract with another for the lease of their respective roads, in such manner as the contract may prescribe, involves the power to make a lease for a term of years."
>
> See also Woodruff *vs.* Erie Railroad, 93 N. Y., 616.

There is nothing novel or startling in the idea of one road being leased for a term of years to another; it is a right which has always been recognized and is perfectly well established, and until recently, and in the absence of a positive statute it could be done by the authority of the directors alone. In this respect only the law has recently been amended.

Chapter 696 of the Laws of 1892, affirming the old law, enacts that any railroad corporation or any corporation operating a railroad may contract with another for the use of their respective roads. As to leases for terms exceeding one year it is in terms declared that (Sec. 78)

> "Such contract shall not be binding or valid unless approved by *a vote* of the stockholders owning at least two-thirds of the stock of each corporation present and voting in person or by proxy at a meeting thereof called separately for that purpose."

All the statutory requirements were complied with in effecting the lease which the plaintiff now asks this Court to set aside.

It was conceded by the plaintiff upon his statement of the case, that the lease had been approved by "the votes of the holders of more than two-thirds of the stock of the defendant" corporation (folio 116) *and the denial of information and belief in the complaint upon this point is thereby abandoned.*

Even had this admission not been made, it is respectfully submitted that there is nothing in the complaint to show that the legal requirements were not complied with.

The complaint must set forth the facts, and it does not explicitly allege that two-thirds of the stock were not represented at the meeting on February 15th, 1893, held for the purpose of approving the lease, nor does it allege that a resolution was not passed by the necessary vote at such meeting approving the lease.

Furthermore, the complaint does not allege that the lease was not duly approved or ratified at some other meeting.

II.

FRAUD.—The lease in question cannot be attacked on the ground of fraud, for all of the attributes and features of a fraudulent transaction are noticeably absent.

The most characteristic marks of a fraudulent transaction are concealment and misrepresentation. In the present instance, not only are these features lacking, but the whole course of the proceeding negatives the idea of fraud.

The directors of the lessor company volunteered to fully and explicitly explain the transaction in advance of its execution; and thereby not merely afforded opportunity for opposition, but even invited criticism of the proposed plan before any action was taken, and before any third person had acquired vested rights.

In place of practicing concealment the directors exhibited the plan proposed to be adopted to every stockholder, as shown by the plaintiff's own complaint. In place of misrepresentation, the most absolute frankness characterized the action of the directors.

Not a single badge of *fraud* can be discerned in any part of the transaction. If the plaintiff has any cause for complaint it must be based on other grounds.

III.

PERSONAL INTEREST OF DIRECTORS.—There is nothing in the complaint to show that in the transaction there set forth a majority of the directors were acting in their own interest and in a manner destructive of the corporation or of the rights of any stockholders.

It is not alleged that a *majority* of the directors nor that *any officer* was privy to or cognizant of any scheme to divert profits from the corporation or its stockholders to any individuals. It is merely alleged that "certain persons, some of whom were directors of the company," concocted such a scheme. The complaint is clearly defective because it fails to allege that such persons were a majority of the directors or had control of the Board.

It is not alleged in the complaint that motives of personal interest influenced the Board of Directors in any manner.

As to the stockholders it is immaterial, so far as the legality of the transaction is concerned, whether they were influenced by motives of personal inter-

est or not. Even if it be conceded, though it does not so appear from the complaint, that the stockholders in authorizing this lease acted from motives of personal interest, and expected to receive special advantages from the transaction, the transaction is not invalidated.

THE FACT THAT THE STOCKHOLDERS ARE INFLUENCED BY CONSIDERATIONS OF PERSONAL INTEREST DOES NOT AFFECT THE VALIDITY OF THE TRANSACTION.

There is a very important distinction between a director and a stockholder of a corporation. The former is a trustee for the company, and as such must show the same high standard of good faith which is demanded of all persons occupying fiduciary positions. He cannot make a contract with himself, nor in any way take advantage of his trust relationship for merely personal ends.

With a stockholder, however, an entirely different rule obtains.

Morawetz, Sec. 477:

> "The rule that the agents of a corporation have no authority to represent it in any transaction in which they are personally interested in obtaining an advantage at the expense of the company has not been extended to the majority, who are authorized to bind the corporation by their vote at a general meeting of the stockholders. It is true that the majority derive their powers from an implied delegation of authority from the other shareholders, and are bound to use their powers in good faith for the benefit of the whole association. But an investigation into the personal interests of the numerous shareholders voting at a general meeting would obviously be very difficult, if not impossible, and great uncertainty would result if the validity of acts of the majority were made to depend upon such an investigation. It has, therefore, been held, for reasons of conveience, amounting to a practical neces-

> sity, that *shareholders in a corporation are not disqualified from voting at a general meeting of the company by reason of their individual interests in the result of the vote.*"

This principle is well illustrated by the following case:

Northwestern Transp. Co. vs. *Beatty*, L. R., 12 App. Cas., 589.

At a meeting of the directors of the company, Beatty, one of the directors, secured the passage of a resolution for the purchase of a steamboat by the company from himself. At a general meeting of the shareholders the action of the directors was ratified, Beatty personally casting a majority of the votes therefor. But for his vote the resolution would have failed of adoption. The defeated minority having thereupon appealed to the Court, it was adjudged that the vendor was entitled to exercise his voting power as a shareholder in the general meeting to ratify the action of the directors' meeting, and that his doing so could not be deemed oppressive by reason of his individually possessing a majority of the votes acquired in a manner authorized by the constitution of the company.

In *Gamble* vs. *Queens Co. Water Co.*, 123 N. Y., 91, a stockholder had voted for a resolution authorizing the purchase by the company from himself of certain property, the payment to be made by certain stocks and bonds, and the Court said (page 97):

> "In so doing he committed no legal wrong. A shareholder has a legal right at a meeting of the shareholders to vote upon a measure, even though he has a personal interest therein, separate from other shareholders. In such a meeting each shareholder represents himself and his own interests solely, and he in no sense acts as a trustee or representative of others. The law of self-interest has at such times very great and proper sway. There can be little

doubt, too, that at such meetings those who do vote upon their own stock vote upon it solely in the light of their own interest, or at least in what they conceive to be their own interest."

See *Farmers' Loan & T. Co.* vs. *Toledo, &c., R. Co.*, 54 Fed. R.. 759.

IV.

OPPRESSION.—The complaint alleges no facts from which oppression upon the part of the majority of the stockholders toward the minority can be predicated.

Gamble *vs.* Queens Co. Water Co., 123 N. Y., 91.

Beveridge *vs.* N. Y. Elevated R.R. Co., 112 N. Y., 1 (*supra*).

In *Gamble* vs. *Queens Co. Water Co.*, 123 N. Y., at page 99, the rule as to *oppression* of a minority and the proof requisite to maintain an action on that ground, is laid down as follows:

"It is not, however, every question of mere administration or of policy in which there is a difference of opinion among the shareholders that enables the minority to claim that the action of the majority is oppressive, and which justifies the minority in coming to a Court of Equity to obtain relief. Generally, the rule must be that in such cases the will of the majority shall govern. The Court would not be justified in interfering even in doubtful cases, where the action of the majority might be susceptible of different constructions. To warrant the interposition of the Court in favor of the minority shareholders in a corporation or joint stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that *no one thus acting* could

> have been influenced by any *honest* desire to secure such interests, but he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company and in a manner inconsistent with its interests. Otherwise the Court might be called upon to balance probabilities of profitable results to arise from the carrying out of the one or the other of different plans proposed by or on behalf of different shareholders in a corporation, and to decree the adoption of that line of policy which seemed to it to promise the best results, or at least to enjoin the carrying out of the opposite policy. This is no business for any Court to follow."

The meeting of stockholders was publicly called and its object plainly stated in the call. At the meeting more than two-thirds of the entire stock was represented, but so far from the minority being oppressed by the majority, it is *not alleged that a single dissenting vote was cast.*

V.

COMMON DIRECTORS.—The plaintiff, to sustain the complaint, cannot invoke the doctrine that the lease is voidable because some of the directors of the lessor were interested in the prospective profits of the lessee.

Common directors in a transaction between two corporations do not render the act void, but only voidable at the election of either corporation or a majority of the stockholders.

This rule is based upon the fact that there must, in such a case, be conflicting interests and conflicting duties; and in order that the courts might be relieved from the necessity of investigating the extent of those conflicting interests and duties, the stringent rules in regard to agents and principals were adopted, namely, that at the option of the *cestui que trust,* of the corporation, such contracts may be avoided.

The reasons for this rule are clearly discussed

by VAN BRUNT, *J.*, in case of Metropolitan Elevated Ry. Co. *vs.* Manhattan Ry. Co., 14 Abb. N. C., 103, 285–287.

A minority of the stockholders, however, cannot exercise this election.

See Wallace *vs.* Long Island R.R. Co., 12 Hun, 460, 464, where the Court says:

> "Still, the mere fact that the same persons were directors of the corporation which made the lease and of that which took it, is not of itself sufficient to avoid the contracts at the instance of one or more *stockholders* against the will of the corporation. That fact alone might entitle either corporation to avoid the lease, but I apprehend it does not give that right to a stockholder."

VAN BRUNT, *J.*, in the case of the *Metropolitan Elevated Ry. Co.*, *supra*, after citing the above from the *Wallace case*, says (p. 273):

> "The principle is here recognized that the majority of the stockholders may ratify a lease made by the directors, and *that a minority cannol disaffirm.* That, therefore, it must be the majority of the shareholders acting through the corporation who repudiate, and *no shareholder has the power to exercise that right against the will of the majority.*"

A majority of the stockholders of the Brooklyn City Railroad Company are estopped in this case by the vote of February 15, 1893.

FIFTH POINT.

The plaintiff is barred by his acquiescence and laches from maintaining this suit.

The lease sought to be vacated and set aside by this action was made in the early part of the year

1893, and, as appears by the complaint, this lease was ratified and approved by the stockholders on February 15, 1893 (fol. 31). The railroad property and franchises of the Brooklyn City Railroad Company were transferred to the Brooklyn Heights Railroad Company on June 6, 1893 (fol. 32).

It appears that the railroad has been operated under the arrangement set forth in Schedule A annexed to the complaint, and that the plaintiff has received dividends at the rate of ten per cent. per annum upon his stock at various times since the execution of such lease. The present action was only commenced on the first day of June, 1894.

It is obvious that many third persons who had no part in the transactions complained of have acquired rights and interests in the property in question subsequent to the execution of the lease and prior to the commencement of this action. If the plaintiff was in fact aggrieved by this lease, it was his duty to act at once, before third persons should acquire rights in the property. The plaintiff cannot sit by silent, for the purpose of waiting to see whether or not the outcome of the lease will be beneficial to him, and then have it set aside if he deems that his interests will be promoted thereby. If he is aggrieved by the execution of the lease, he must act at once; he cannot stand silent while the stock of the Traction Company is placed upon the market and purchased by hundreds and, perhaps, thousands of outside parties, and then claim that the lease is void.

It appears from the appendix to the complaint (fol. 46) that a deposit of four million dollars was to be made as a guarantee fund for the performance of the terms of the lease by the lessee. The plaintiff should have taken action before this guarantee fund was deposited, if he desired to do so at all.

The plaintiff had the opportunity to object to the lease at the stockholders' meeting called for

the purpose of approving it. It was his duty to do so then, if he ever intended to make objection. It does not appear that he made the slightest opposition.

Since then the plaintiff has remained silent on this point; he has made no demand upon the directors to have the lease set aside; he has asked for larger dividends, but he has not asked to cancel the lease; he has regularly received his dividends and enjoyed the result of the lease; he has done everything that constitutes an acquiescence in its execution, and it is now too late for him to attempt to assert a claim that he is wronged thereby. Great injustice would result to third parties who have acquired rights under the lease if the plaintiff were now allowed to maintain this suit or have the lease set aside after such lapse of time and such acts of acquiescence.

That such delay in bringing suit will prove a bar to a suit in equity on the ground of *laches* is a well recognized doctrine in courts of equity.

Smith *vs.* Clay, 2 Ambl., 645.
Calhoun *vs.* Millard, 121 N.Y.,69, at 82.
Alvord *vs.* Syracuse Sav. Bk., 98 N. Y., 599, 610.
Matter of Neilly, 95 N Y., 382, 390.
Coit *vs.* Campbell, 82 N. Y., 509, 512.
Lyon *vs.* Park, 111 N. Y., 350, 357.

The doctrine as applied to such a suit as this is also well defined.

Morawetz on Private Corporations, Sec. 630.

* * * * * *

> "The shareholders' meeting is intended to bring together the whole corporation; every member is entitled to be present and to make known his views. It is not just that shareholders, knowing an act of the majority to be unauthorized, should lie by, and reserve an option to repudiate the act in case of the loss, or to enjoy its benefits if there should be a profit.

The case of *Kent* vs. *The Quicksilver Mining Co.*, 78 N. Y., 159, is a leading case on this subject. In that case the majority of shareholders at a meeting adopted a resolution authorizing any member to convert his shares into preferred shares upon paying a certain bonus to the company. A large number of shares were accordingly reissued as preferred shares. After the lapse of four years, during which the preferred shares were quoted daily in the public prints and were mentioned in the annual report of the directors, a member who had retained his original shares brought suit to restrain the company from according any preference to the holders of the preferred shares.

FOLGER, *J.*, in his opinion of the Court (on page 184), says:

> "But there remains a serious question; whether, though there was at the outset a minority of the stockholders who gave no assent to the corporate act, there has not been *such tacit acquiescence and delay in action by that minority as to amount to indefensible laches and estoppel upon those who constitute it and their assigns.* In our judgment there has * * *
>
> (p. 185.) We think that these facts, most of which are set forth in the findings in two of the cases, warrant the conclusion of law therein that the stockholders by acquiescing in the action of the corporation in making the preferred stock have ratified and assented thereto, and that the same is binding upon them by reason of such assent and ratification.
>
> * * * "When it is a question of the right of a stockholder to restrain the corporate body within its express or incidental powers, a stockholder may in many cases be denied on the ground of his express assent or his intelligent, though tacit consent to the corporate action. If there be a departure from the statutory direction, which is to be considered merely a breach of trust to be restrained by a stockholder, it is pertinent to consider what

has been his conduct thereto. A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or *malum prohibitum*; then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interests of the stockholders; *they may be made good by the assent of the stockholders, so that strangers to the stockholders, dealing in good faith with the corporation, will be protected in a reliance upon those acts.*"

* * * (p. 187.) "And where third parties have dealt with the company, relying in good faith upon the existence of corporate authority to do an act, there is not needed that there be an express assent thereto on the part of the stockholders to work an equitable estoppel upon them. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act, and when harm would come to such third parties if the act were held invalid, the stockholders are estopped from questioning it.

"*We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorized act and to secure judicial redress after knowledge of the committal of it, whereby innocent third parties have been led to put themselves in a position from which they cannot be taken without loss.* It is the doctrine of equitable estoppel which applies to members of corporate or associated bodies, as well as to persons acting in a natural capacity."

This case was followed in

Sheldon Hat Blocking Co. *vs.* Eickemeyer Hat Blocking Machine Co., 90 N. Y., 607, at pages 613 and 614.

Holmes & Griggs Mfg. Co. *vs.* Holmes & Wessel Metal Co., 127 N. Y., 252, at page 258.

Skinner *vs.* Smith, 134 N. Y., 240, at pages 247 and 249.

SIXTH POINT.

The judgment appealed from should be affirmed with costs.

Dated New York, June 30th, 1896.

DAVIES, STONE & AUERBACH,
Attorneys for the Respondent
The Brooklyn Heights R.R. Co.

JULIEN T. DAVIES,
CHARLES FRANCIS STONE,
HERBERT BARRY,
Of Counsel.

Supreme Court—Appellate Division,

SECOND DEPARTMENT.

PATRICK H. FLYNN,
Appellant,

against

THE BROOKLYN CITY RAILROAD COMPANY and THE BROOKLYN HEIGHTS RAILROAD COMPANY,
Respondents.

CASE ON APPEAL.

JAMES C. CHURCH,
Attorney for Appellant.

WILLIAM C. TRULL,
Attorney for Respondent B. C. R. R. Co.

DAVIES, STONE & AUERBACH,
Attorneys for Respondent B. H. R. R. Co.

NEW YORK:
C. G. BURGOYNE, WALKER AND CENTRE STS.
1896.

d May 25th 1896

INDEX.

Supreme Court,

KINGS COUNTY.

PATRICK H. FLYNN

AGAINST

THE BROOKLYN CITY RAILROAD COMPANY and THE BROOKLYN HEIGHTS RAILROAD COMPANY.

Statement.

This action was commenced in the City Court of Brooklyn by the service of the summons and complaint upon each of the defendants on June 1, 1894; the answers of the defendants were served June 20, 1894, and other or amended answers were served October 22, 1894. There has been no change of parties, and the names of the parties are as above designated, and the opinion of the Court is hereto attached.

The case came on for trial before Hon. WM. J. OSBORNE at a Special Term of the Supreme Court March 21, 1896, and complaint was dismissed upon the pleadings.

5

THE CITY COURT OF BROOKLYN.

PATRICK H. FLYNN,
Plaintiff,

6

AGAINST

THE BROOKLYN CITY RAILROAD COMPANY and THE BROOKLYN HEIGHTS RAILROAD COMPANY,
Defendants.

} Summons.

TO THE ABOVE-NAMED DEFENDANTS:

7 You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated June 1st, 1894.

JAMES C. CHURCH,
Plaintiff's Attorney,

8 Office and Post-office address,
No. 26 Court Street,
Brooklyn,
N. Y.

THE CITY COURT OF BROOKLYN.

PATRICK H. FLYNN

AGAINST

THE BROOKLYN CITY RAILROAD COMPANY and THE BROOKLYN HEIGHTS RAILROAD COMPANY.

The plaintiff, by James C. Church, his attorney, for complaint and cause of action against the defendants, alleges :

I. That the defendant The Brooklyn City Railroad Company is a dometic corporation, duly incorporated under and by virtue of the laws of the State of New York.

II. That as such corporation it is and has been for several years the owner and operator of a street surface railroad in the City of Brooklyn and the adjoining towns in Kings and Queens Counties.

III. That it has tracks on many of the most important thoroughfares in said city and counties, and terminals at many of the most desirable points.

IV. That, in addition, said railroad has acquired the rights of other railroads in said counties, so that its line as a whole consists of more than one hundred miles of streets upon which its railroads are actually constructed, and that it is also possessed of franchises, consents and privileges which will enable it to build and extend its lines upon many other streets in the city and counties above named.

V. That, in addition, it is the owner of much valuable real estate, on which are erected expensive depots, stables, car houses, electric power houses and other

13 structures necessary for the proper and convenient operation of said railroad.

VI. That it possesses a large number of cars, horses, electric cars and other appurtenances for the complete and satisfactory operation of its railroad.

VII. That the capital stock of said railroad company, prior to the execution of the lease herein mentioned, was nine million dollars, but the same was
14 thereafter increased to twelve million dollars, and said increase, amounting to three million dollars, was all paid in.

VIII. That for many years past said railroad company has regularly declared dividends, and, previous to the execution of the lease hereinafter referred to, the said company declared a dividend of eight per cent. upon the capital stock of nine million dollars.

15 IX. That this plaintiff is now and was at the time of and for a considerable period prior to the execution of the lease hereinafter mentioned the owner and holder in his own right of five hundred shares of the capital stock of said railroad company, and as such was then and is now entitled to all benefits and rights of a stockholder of said company.

X. That about the month of January, 1892, the said company duly received the proper consents from the local
16 authorities and the Board of Railroad Commissioners to the operation of its railroad by electric-motor power, and previous to February 15, 1893, it had been engaged in equipping its railroad by electric-motor power; and, at that time, had completed and was operating the Court Street, Third Avenue, Hamilton Avenue and Second Avenue lines of said company by electricity.

XI. That prior to the execution of the lease hereinafter referred to, the said company had pur-

chased and was the owner of a large number of electric cars and other equipments for the purpose of equipping its railroad, and had acquired the land for and was constructing large and expensive power stations for the purpose of generating electricity to operate its said railroad.

XII. That the value of the real estate, franchises, tracks, cars and other property of said company prior to February 15, 1893, was worth the sum of thirty million dollars and upwards, and that said company was in a position to and could procure all the funds necessary to properly equip and operate by electricity its entire system of railroads.

XIII. That the operation of a street-surface railroad by electricity is more profitable than such operation by horses, and that the operating expenses of such railroad by the use of electric power are from thirty to forty per cent. less than by the use of horses, and that the privilege of changing the motive power of said railroad company from horse-power to electric power was a privilege of great value to the said company and its stockholders.

XIV. That by the reduction of the operating expenses of said railroad company and the increase in the number of passengers, due to the advantages arising from the adoption of electricity as a motive power, the company is in a position to increase its earnings and pay dividends to the stockholders in excess of ten per cent., and that with the future growth of the city which would result from the increase of traveling facilities and advantages offered by means of the electric cars its profits would largely and rapidly increase.

XV. That upon information and belief and prior to February 15, 1893, certain persons, some of whom were directors of the said company, designed and entered into a scheme to divest a portion of the earnings of said company from the stockholders, and in pursuance of

said scheme it was planned and arranged that the railroad of the said company and its property and franchises should be leased to another company for a consideration less than the actual rental value thereof, and that a controlling interest in the stock of said other company should be owned by the said certain persons and not by the stockholders of the Brooklyn City Railroad Company, and that the difference between the actual rental value of the said railroad, property and franchises, and the rental paid under the said proposed lease, would thus ensue to the profits of the stockholders of the said other company and not to the profit of the stockholders of the Brooklyn City Railroad Company.

XVI. That, in pursuance of said scheme, the plaintiff is informed and verily believes that the said certain persons from time to time purchased the stock of the said Brooklyn City Railroad Company to acquire a controlling interest therein, in order thereby to carry into effect the design of making said lease as aforesaid.

XVII. That thereafter and on or about January 6, 1893, in pursuance of the scheme aforesaid, said persons caused to be issued by said company to its stockholders a statement setting forth a proposition relating to the leasing of the railroad of the said Brooklyn City Railroad Company, a copy of which is hereto annexed, marked "A," and made a part of this complaint.

XVIII. That the defendant the Brooklyn Heights Railroad Company is a domestic corporation duly incorporated under the laws of the State of New York, and is engaged in operating a railroad along Montague street, one-half of a mile or thereabouts in length.

XIX. That the certain persons aforesaid interested in the scheme hereinbefore described had at the time of said statement control of the said Brooklyn Heights Railroad.

XX. That previous to and on or about February 15, 1893, the bonded indebtedness of the Brooklyn Heights Railroad Company was $250,000 and its capital stock $200,000, and the value of said stock did not exceed fifty per cent. of its face value. That said last-named railroad was not then a profitable or paying road, and that the earnings of said railroad amounted to less than the operating expenses and fixed charges thereof, and that its only property at that time was its franchise upon Montague street and the roadbed thereon, a power house containing the machinery for the operation of its railroad by cable and a few cars upon the same. That the total valuation of the franchises and other property of said last-named company did not exceed $350,000.

XXI. That, to further effect the purposes of the scheme aforesaid, it was intended to transfer the stock of said Brooklyn Heights Railroad Company to a foreign corporation, called a "Traction Company," not organized or authorized by law to own or operate a railroad. A portion of the capital stock of which traction company was to be allotted to such stockholders of the Brooklyn City Railroad Company as might subscribe and pay therefor. The remainder of said stock being reserved by the certain persons aforesaid for their own use, and thereby in effect to lease the railroad and property of the Brooklyn City Railroad Company to said foreign corporation, and to divest a portion of the earnings of said railroad from the stockholders thereof to the certain persons aforesaid, holders of the said reserved stock of the said traction company.

XXII. That by the statement aforesaid, marked "Exhibit A," it was intended to convey the impression that the proposed lease of the railroad and property of the Brooklyn City Railroad Company was to be made to a company with a capital stock of $30,000,000; whereas in fact no street surface railroad corporation with a capital stock of $30,000,000 or any amount

29 approaching that sum had been incorporated or existed in the State of New York, to which the railroad of said Brooklyn City Railroad Company could then be lawfully leased ; but, on the contrary, it was, in fact, intended to lease said railroad and property to the Brooklyn Heights Railroad Company, which was incapable of paying a dividend of ten per cent. upon the stock of said Brooklyn City Railroad Company, otherwise than from the proceeds of operating the railroad of said last-named company under said lease.

30

XXIII. That the scheme of thus leasing the railroad and property of the Brooklyn City Railroad Company as aforesaid was unlawful, the effect and intent thereof on the part of the shareholders of the Brooklyn City Railroad Company, who designed, approved and carried the same into effect, as hereinafter set forth, being to injure and defraud the stockholders of said company.

31 XXIV. That, in pursuance of such scheme as above set forth, the said lease was executed on behalf of the Board of Directors of both said railroad companies, and it is claimed on the part of the defendants that at a meeting of the stockholders of the Brooklyn City Railroad Company, held on the 15th day of February, 1893, said lease was ratified and approved by stockholders owning two-thirds of the stock of the Brooklyn City Railroad Company, whereas, as the plaintiff is informed and believes, said lease was not so ratified and approved.

32

XXV. That thereafter the said defendant the Brooklyn City Railroad Company, in pursuance of the scheme above set forth, and on June 6, 1893, delivered to said defendant the Brooklyn Heights Railroad Company all of the railroad property and franchises of the said Brooklyn City Railroad Company.

XXVI. That thereupon a foreign corporation known as the Long Island Traction Company was organized with a capital stock of $30,000,000, divided into three

hundred thousand shares, which became the owner of the entire capital stock of the Brooklyn Heights Railroad Company, two hundred and seventy thousand shares of which were allotted to the stockholders of the Brooklyn City Railroad Company, at $15 per share, in the proportion of three shares of the stock of said traction company for every ten shares of the stock of said Brooklyn City Railroad Company. The remaining thirty thousand shares of said stock being reserved by certain persons, shareholders of the Brooklyn City Railroad Company who had approved as aforesaid the lease hereinbefore mentioned for their own use and benefit.

XXVII. That the said privilege of permitting the holder of the stock of the Brooklyn City Railroad Company to purchase stock of said traction company as aforesaid was in no respect a compensation to the stockholders of the said Brooklyn City Railroad Company for the injury they would receive through said lease. That by the said plan of distributing the said thirty millions of stock of the said traction company among the stockholders of the said Brooklyn City Railroad Company, the said stockholders were prevented from receiving the whole amount of said stock and were unjustly and fraudulently deprived of three millions of dollars in par value thereof, and of a corresponding portion of the earnings of said traction company. That said traction company's stock is of no value except as derived from the operation of the railroad of the Brooklyn City Railroad Company under said lease, and the stockholders of the Brooklyn City Railroad Company are entitled to the full amount of the earnings derived from the operation of its said railroad without any deduction therefrom for the benefit of an intermediate operating concern or company.

XXVIII. That said Brooklyn City Railroad Company is able to pay a dividend largely in excess of ten per cent. upon its present capital stock, that is to say, at least fifteen per cent. thereon, and that by the leas-

ing of this railroad, as aforesaid, its stockholders have been and are wrongfully deprived of said increase in said dividends, besides the benefit resulting therefrom and the advantage consequent upon the certain constant increase in the value of the franchises and property of said last-mentioned company through the extension of its road and increase in travel thereon, due to the growth of the city from year to year.

XXIX. That this plaintiff at divers times since the execution of said lease duly demanded of the Brooklyn City Railroad Company, its officers and directors, as a stockholder in said Brooklyn City Railroad Company, his share of the proceeds of the operation of the railroad of said railroad company over and above the ten per cent. paid to him under said lease, but that the said defendant the Brooklyn City Railroad Company has refused and neglected to pay the plaintiff his said portion of said proceeds to which he was legally and properly entitled.

XXX. That the plaintiff herein has from time to time notified the directors and officers of said Brooklyn City Railroad Company that the leasing aforesaid of the railroad and property of said company was unlawful and to the injury of the stockholders of said company, and has demanded that there shall be distributed among the stockholders of said company all the profits and receipts arising from the operation of said railroad and of said property as the same may accrue, without regard to the said lease, and that such distribution necessarily involved such action on the part of said officers and directors as would effect the annulling of said lease, but that said directors and officers have failed and neglected to take any proceedings toward the annulling of said lease or agreement.

Wherefore, this plaintiff demands judgment against the defendant, that the said lease or agreement between the Brooklyn City Railroad Company and the Brooklyn Heights Railroad Company be declared null and void,

and that the same be set aside so that it will have no further force and effect, and that the defendant, the Brooklyn Heights Railroad Company, be directed to transfer and deliver to the Brooklyn City Railroad Company all the property and assets, whether real or personal, of the said Brooklyn City Railroad Company, in the possession of the said Brooklyn Heights Railroad Company.

And that said defendant the Brooklyn Heights Railroad Company be directed to account for all moneys received by it from the operation of said Brooklyn City Railroad Company, and that it be directed to pay over to the Brooklyn City Railroad Company all moneys so acquired by it, and that the plaintiff have such other and further relief as may be just, besides the costs of this action.

JAMES C. CHURCH,
Plaintiff's Attorney,
Office and Post-office address,
No. 26 Court Street,
Brooklyn, N. Y.

"A."

OFFICE OF THE BROOKLYN CITY RAILROAD COMPANY.

BROOKLYN, January 6, 1893.

TO THE STOCKHOLDERS OF THE BROOKLYN CITY R. R. CO.:

The Board of Directors of the Brooklyn City Railroad Company respectfully submit to the Stockholders the following statement:

It is generally known that the Board of Directors during the past year has received repeated propositions from parties desiring to obtain control of this Company, but none of these propositions have been of such

a character to warrant their communication to the Stockholders.

The proposition which has now been submitted, however, is one which gives the Stockholders very great advantages; it is briefly as follows:

"A responsible syndicate, represented by the New York Guarantee and Indemnity Company, undertakes to procure the leasing of the Brooklyn City Railroad Company by a street surface railroad company, and to procure a guarantee by the lessee of ten per cent. dividends on the stock of the Brooklyn City Railroad Company, and the deposit in a Trust Company on the delivery of the lease of Four Millions of Dollars ($4,000,000) as a guarantee fund for the performance of the lease.

The lessee is to pay and discharge all fixed charges of the Brooklyn City Railroad Company, including interest on bonded debt and all taxes and assessments, and license fees, and also pay the expenses of keeping up the organization of the Brooklyn City Railroad Company, furnishing it with suitable offices, etc.

The Syndicate is to give to the Stockholders of the Brooklyn City Railroad Company the right to purchase three shares of a Traction Company's stock of the par value of $100 each, for every ten shares of the par value of $10 each held by the stockholders in the Brooklyn City Railroad Company at the date of the delivery of the lease, at $15 per share. When the holdings of any stockholder in the Brooklyn City Railroad Company shall be less than ten shares, he is entitled to his proportionate share of Traction Company stock in scrip.

The capital stock of the Traction Company will be fixed at $30,000,000, and this arrangement will place in the stockholders of the Brooklyn City Railroad Company nine-tenths of the capital of the Traction Company; the remaining one-tenth will be allotted to the members of the Syndicate, but shall be paid for at the same rate as that purchased by the Stockholders of the Brooklyn City Railroad Company. This arrangement

will place the control of the Traction Company by a large majority in the hands of the Stockholders of the Brooklyn City Railroad Company. 49

The right to subscribe for the Three Millions of Dollars of the capital stock of the Brooklyn City Railroad Company, the issue of which is authorized, is to remain with the Stockholders of the Brooklyn City Railroad Company, and will no doubt be issued to them at par during the year 1893.

The surplus in the treasury of the Brooklyn City Railroad Company at the date of the delivery of the lease will be divided in due time among the Stockholders of the Brooklyn City Railroad Company. 50

Rights to purchase the stock of the Traction Company and to subscribe to the unissued stock of the Brooklyn City Railroad Company will be arranged so they may be disposed of by Stockholders not wishing to make the purchase or subscription.

The right to purchase the stock of the Traction Company will remain open for sixty days after the lease is ratified by the Stockholders of the Brooklyn City Railroad Company. The lease will be laid before the Stockholders for ratification at a meeting, notice of which accompanies this circular. 51

The Syndicate has deposited with the New York Guaranty and Indemnity Company the sum of $500,000 as an earnest of its good faith to carry out the proposition as made.

The Board of Directors are unanimously of the opinion that the proposition is a most favorable one, and unhesitatingly recommend it to the Stockholders of the Company. 52

As the law requires that a lease shall be approved by a vote of the stockholders owning at least two-thirds of the stock of the Company, present and voting in person or by proxy, at a meeting of the stockholders, it is desirable that in case it will not be convenient for you to attend the meeting you should promptly forward your proxy.

Enclosed find proxy, which you will please sign and

53 have your signature witnessed, and return same to the undersigned.

By order of the Board of Directors.

THOMAS P. SWIN,
Assistant Secretary.

CITY OF BROOKLYN, }
54 County of Kings, } ss. :

PATRICK H. FLYNN, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has has heard read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

PATRICK H. FLYNN.

55 Sworn to before me this 1st }
day of June, 1894. }

CHARLES W. CHURCH, JR.,
Notary Public,
Kings Co.

THE CITY COURT OF BROOKLYN.

56

PATRICK H. FLYNN

AGAINST

THE BROOKLYN CITY RAILROAD COMPANY and THE BROOKLYN HEIGHTS RAILROAD COMPANY.

The defendant, the Brooklyn Heights Railroad Company, by Davies, Stone & Auerbach, its attorneys, answering the complaint herein :

FIRST. Admits each of the allegations contained in 57
paragraphs or subdivisions of said complaint numbered I., III., IV., V., VIII., IX, X., XI., XVIII.

SECOND. The said defendant, upon information and belief, denies each each and every allegation contained in paragraphs or subdivisions of said complaint numbered VI., XV., XVI., XVII., XIX., XXIII., XXV., XXVI., XXVII. and XXVIII.

THIRD. The said defendant admits each and every al- 58
legation contained in paragraph or subdivision of said complaint numbered II. except the allegation that the said Brooklyn City Railroad Company is an operator of a street-surface railroad in the City of Brooklyn and the adjoining towns in Kings and Queens Counties, which allegation this defendant denies, and this defendant denies that the said Brooklyn City Railroad Company operates any railroad.

FOURTH. The said defendant denies each of the alle- 59
gations contained in paragraph or subdivision of said complaint numbered VII.

FIFTH. The said defendant admits the allegation contained in paragraph or subdivision of said complaint numbered XII., that said Brooklyn City Railroad Company was in a position to and could procure all the funds necessary to properly equip and operate by electricity its entire system of railroads, and denies any knowledge or information sufficient to form a belief of 60
any or either of the other allegations in said paragraph or subdivision of said complaint contained.

SIXTH. The said defendant denies any knowledge or information sufficient to form a belief of either or any of the allegations contained in paragraph or subdivision of said complaint numbered XIII., except the allegation that the operating expenses of said railroad by the use of electric power are from thirty to forty per cent. less

61 than by the use of horse power, which said allegation said defendant upon information and belief denies.

SEVENTH. The said defendant denies any knowledge or information sufficient to form a belief of either or any of the allegations contained in paragraph or subdivision of said complaint numbered XIV., except the allegation that the company is in a position to increase its earnings and pay dividends to the stockholders in excess of ten per cent., which said allegation the said
62 defendant upon information and belief denies.

EIGHTH. The said defendant admits the allegation as to the amount of the bonded indebtedness and capital stock of the Brooklyn Heights Railroad Company contained in paragraph or subdivision of said complaint numbered XX., and upon information and belief denies each and every other allegation contained in said paragraph or subdivision of said complaint.

63 NINTH. The said defendant admits the allegation contained in paragraph or subdivision of said complaint numbered XXI. that a portion of the capital stock of this traction company was to be allotted to such of the stockholders of the Brooklyn City Railroad Company as might subscribe and pay therefor, and upon information and belief denies each and every other allegation in said paragraph or subdivision of said complaint contained.

64 TENTH. The said defendant, upon information and belief, denies each and every allegation contained in paragraph or subdivision of said complaint numbered XXIV., except the allegation that it is claimed on the part of defendant that at a meeting of the stockholders of the Brooklyn City Railroad Company, held on the 15th day of February, 1893, said lease was ratified and approved by stockholders owning two-thirds of the stock of the Brooklyn City Railroad Company, which said allegation this defendant admits.

ELEVENTH. The said defendant admits each and every allegation contained in paragraph or subdivision of said complaint numbered XXIX., except the allegation that the defendant the Brooklyn City Railroad Company has refused or neglected to pay to the plaintiff any share of the proceeds of the operation of its railroad, to which the said plaintiff was legally or properly entitled, which said allegation the said defendant, upon information and belief, denies. 65

TWELFTH. The said defendants admits each and every allegation contained in paragraph or subdivision of said complaint numbered XXX., except the allegation that such distribution necessarily involved such action on the part of said officers and directors as would effect the annulling of said lease, which said allegation said defendant, upon information and belief, denies; and upon information and belief avers that the plaintiff never requested the defendant the Brooklyn City Railroad Company or its Board of Directors or any of its officers to take any action or institute any proceedings for the cancellation or annulment of said lease. 66 67

THIRTEENTH. The defendant, further answering the complaint in this action, upon its information and belief denies that by the statement marked "Exhibit A," referred to in paragraph numbered XXII. of the complaint, it was intended to convey the impression that the proposed lease of the railroad and property of the Brooklyn City Railroad Company was to be made to a company with a capital stock of thirty millions of dollars, and upon information and belief denies that the Brooklyn Heights Railroad Company was incapable of paying a dividend of ten per cent. upon the stock of said Brooklyn City Railroad Company otherwise than from the proceeds of operating the railroad of said last-named company under said lease; and denies any knowledge or information sufficient to form a belief as to whether in fact no street-surface railroad corporation with a capital of thirty million dollars, or any amount approaching that 68

69 sum, had been incorporated or existed in the State of New York, to which the railroad of said Brooklyn City Railroad Company could, at the time in that behalf referred to in said paragraph numbered XXII. of the complaint, be lawfully leased.

FOURTEENTH. The said defendant further answering the complaint herein shows to the Court and avers, upon information and belief:

That on and for a long time prior to the 14th day of
70 February, 1893, each of the defendants herein was a domestic corporation, duly incorporated under the laws of the State of New York, owning and operating a street-surface railroad in the City of Brooklyn, in said State; that on or about the 14th day of February, 1893, the lease mentioned and referred to in the complaint herein, and to which the defendant prays leave to refer as a part of this its answer upon the trial of this action when the same shall have been produced and proven, was duly made and executed by each of the
71 defendants under its corporate seal under and by virtue of a resolution of their respective Boards of Directors, duly passed and adopted; that subsequently, on or about the 14th day of February, 1893, the stockholders of the defendant the Brooklyn Heights Railroad Company, at a meeting duly called for that purpose, duly ratified, confirmed, assented to and approved said lease by a vote of the stockholders owning at least two-thirds of the stock of the said the Brooklyn Heights Railroad Company present
72 and voting in person or by proxy at said meeting of the stockholders. The total number of votes cast in approval of said lease at said meeting was one thousand nine hundred and ninety-five out of a possible two thousand votes.

That subsequently and on or about the 15th day of February, 1893, the stockholders of the defendant the Brooklyn City Railroad Company, at a meeting duly called for that purpose, duly ratified, confirmed, assented to and approved said lease by a vote of the stockholders owning at least two-thirds of the stock of

the said the Brooklyn City Railroad Company, present and voting in person or by proxy at said meeting of the stockholders. The total number of votes cast in approval of said lease at said meeting was eight hundred and six thousand six hundred and thirty-two out of a possible nine hundred thousand votes. 73

That at the date of said stockholders' meeting the capital stock of said the Brooklyn City Railroad Company was twelve million dollars, divided into one million two hundred thousand shares, of the par value of ten dollars each, of which capital there was at the date of said stockholders' meeting issued and outstanding only nine hundred thousand shares. 74

This defendant avers, upon information and belief, that on the 15th day of February, 1893, the date of said stockholders' meeting, the plaintiff was the owner of one hundred (100) shares of the capital stock of the defendant the Brooklyn City Railroad Company, having purchased the same on or about the 4th day of February, 1893, with full knowledge that said lease was contemplated. 75

This defendant further avers upon information and belief, that upon June 6, 1893, the said plaintiff owned five hundred shares of the capital stock of the Brooklyn City Railroad Company ; that on said 6th day of June, 1893, with the consent and approval of the said plaintiff, he then being such stockholder as aforesaid, the railroads, property, franchises and privileges described in the said lease mentioned in the complaint were transferred and delivered by the defendant the Brooklyn City Railroad Company to the defendant the Brooklyn Heights Railroad Company, pursuant to the terms of the said lease ; that part of the rental reserved in said lease was an amount which should equal ten per cent. per annum on the par value of the outstanding stock of the Brooklyn City Railroad Company, payable quarterly, on the first days of July, October, January and April, in each and every year ; that subsequent to June 6, 1893, and on or about July 1st and October 1st, 1893, and January 1st and April 1st, 1894, 76

77 the said plaintiff was paid and received dividends equal to ten per cent. per annum upon the par value of his said stock in the Brooklyn City Railroad Company, and that the said plaintiff so received and has thence hitherto retained the same, well knowing that each of said dividends was part of the rental paid by the said defendant the Brooklyn Heights Railroad Company, under the terms of said lease.

This defendant further avers, upon information and belief, that on the said 6th day of June, 1893, the said
78 Brooklyn Heights Railroad Company deposited with certain trustees, pursuant to the terms of said lease, the sum of four million dollars, to secure the payment of the rental reserved in the said lease, and that, relying on the said lease and surrender of possession, the majority of the stockholders of the Brooklyn City Railroad Company subscribed and paid for stock of the Long Island Traction Company in the exercise of the option given them by the terms of "Exhibit A," annexed to the
79 complaint, while others of said stockholders sold and disposed of their option to make said subscription in accordance with the terms of said "Exhibit A," the purchasers of which options have availed themselves of such rights of subscription to the stock of said traction company, and have paid for said stock, and that, since the said 6th day of June, 1893, the shares of the stock of the said traction company have been largely dealt in by the public in reliance upon the said lease and the surrender of possession thereunder.

80 This defendant further avers, upon information and belief, that, since the said 6th day of June, 1893, it, the said Brooklyn Heights Railroad Company, has expended in the conversion, equipment and improvement of the railroads and property leased by it as aforesaid from the defendant the Brooklyn City Railroad Company out of its own funds, not realized from the operation of said railroads or property nor received by it under the said lease, upwards of three-quarters of a million of dollars.

Wherefore, the said defendant demands judgment 81
that the complaint be dismissed with costs.

DAVIES, STONE & AUERBACH,
Attorneys for the Brooklyn Heights R. R.
Co., Defendant,
Office and Post-office address,
No. 32 Nassau Street,
New York City.

82

STATE OF NEW YORK, }
City of Brooklyn, } ss.:
COUNTY OF KINGS, }

W. A. H. BOGARDUS, being duly sworn, says that he
is the secretary of said the Brooklyn Heights Railroad 83
Company, one of the defendants in the above-entitled
action; that the foregoing answer is true to his knowl-
edge, except as to the matters therein stated to be
alleged on information and belief, and that as to those
matters he believes it to be true. That the reason
why this verification is not made by the said defendant
the Brooklyn Heights Railroad Company is that it is a
domestic corporation, of which he is an officer.

W. A. H. BOGARDUS.

Sworn to before me this 20th } 84
day of October, 1894. }

WM. H. JENNINGS,
[L. S.] Notary Public,
Kings Co.,
N. Y.

85

THE CITY COURT OF BROOKLYN.

PATRICK H. FLYNN

AGAINST

THE BROOKLYN CITY RAILROAD COMPANY and THE BROOKLYN HEIGHTS RAILROAD COMPANY.

86

The defendant the Brooklyn City Railroad Company, by William C. Trull, its attorney, answering the complaint herein:

FIRST. Admits each of the allegations contained in paragraphs or subdivisions of said complaint numbered I., III., IV., V., VIII., IX., X., XI., XVIII.

SECOND. The said defendant upon information and
87 belief denies each and every allegation contained in paragraphs or subdivisions of said complaint numbered VI., XV., XVI., XVII., XIX., XXIII., XXV., XXVI., XXVII. and XXVIII.

THIRD. The said defendant admits each and every allegation contained in paragraph or subdivision of said complaint numbered II., except the allegation that it is an operator of a street-surface railroad in the City of Brooklyn and the adjoining towns in Kings and
88 Queens Counties, which allegation this defendant denies and denies that it operates a railroad.

FOURTH. The said defendant denies each of the allegations contained in paragraph or subdivision of said complaint numbered VII.

FIFTH. The said defendant admits the allegation contained in paragraph or subdivision of said complaint numbered XII., that said company was in a position to and could procure all the funds necessary to properly

equip and operate by electricity its entire system of railroads, and denies any knowledge or information sufficient to form a belief of any or either of the other allegations in said paragraph or subdivision of said complaint contained. 89

SIXTH. The said defendant denies any knowledge or information sufficient to form a belief of either or any of the allegations contained in paragraph or subdivision of said complaint numbered XIII., except the allegation that the operating expenses of said railroad by the use of electric power are from thirty to forty per cent. less than by the use of horse power, which said allegation said defendant, upon information and belief, denies. 90

SEVENTH. The said defendant denies any knowledge or information sufficient to form a belief of either or any of the allegations contained in paragraph or subdivision of said complaint numbered XIV., except the allegation that the company is in a position to increase its earnings and pay dividends to the stockholders in excess of ten per cent., which said allegation the said defendant, upon information and belief, denies. 91

EIGHTH. The said defendant admits the allegation as to the amount of the bonded indebtedness and capital stock of the Brooklyn Heights Railroad Company contained in paragraph or subdivision of said complaint numbered XX., and denies any knowledge or information sufficient to form a belief of either or any of the other allegations contained in said paragraph or subdivision of said complaint. 92

NINTH. The said defendant admits the allegation contained in paragraph or subdivision of said complaint numbered XXI., that a portion of the capital stock of this traction company was to be allotted to such of the stockholders of the Brooklyn City Railroad Company as might subscribe and pay therefor, and upon information and belief denies each and every other

93 allegation in said paragraph or subdivision of said complaint contained.

TENTH. The said defendant upon information and belief denies each and every allegation contained in paragraph or subdivision of said complaint numbered XXIV., except the allegation that it is claimed on the part of the defendant, that, at a meeting of the stockholders of the Brooklyn City Railroad Company, held on the 15th day of February, 1893, said lease was rati-
94 fied and approved by stockholders owning two-thirds of the stock of the Brooklyn City Railroad Company, which said allegation this defendant admits.

ELEVENTH. The said defendant admits each and every allegation contained in paragraph or subdivision of said complaint numbered XXIX., except the allegation that this defendant has refused or neglected to pay to the plaintiff any share of the proceeds of the operation of its railroad to which the said plaintiff was
95 legally or properly entitled, which said allegation the said defendant upon information and belief denies.

TWELFTH. The said defendant admits each and every allegation contained in paragraph or subdivision of said complaint numbered XXX., except the allegation that such distribution necessarily involved such action on the part of said officers and directors as would effect the annulling of said lease, which said allegation said defendant upon information and belies denies, and
96 upon information and belief avers that the plaintiff never requested the defendant the Brooklyn City Railroad Company, or its Board or Directors, or any of its officers, to take any action or institute any proceedings for the cancellation or annulment of said lease.

THIRTEENTH. The defendant, further answering the complaint in this action, upon its information and belief, denies that by the statement marked "Exhibit A," referred to in paragraph numbered XXII. of the complaint, it was intended to convey the impression

that the proposed lease of the railroad and property of 97
the Brooklyn City Railroad Company was to be made to a company with a capital stock of thirty millions of dollars, and upon information and belief denies that the Brooklyn Heights Railroad Company was incapable of paying a dividend of ten per cent. upon the stock of said Brooklyn City Railroad Company otherwise than from the proceeds of operating the railroad of said last-named company under said lease; and denies any knowledge or information sufficient to form a belief as to whether, in 98
fact, no street-surface railroad corporation with a capital of thirty million dollars, or any amount approaching that sum, had been incorporated or existed in the State of New York, to which the railroad of said Brooklyn City Railroad Company could, at the time in that behalf referred to in said paragraph numbered XXII. of the complaint, be lawfully leased.

FOURTEENTH. The said defendant, further answering the complaint herein, shows to the Court and avers, 99
upon information and belief:

That on, and for a long time prior to, the 14th day of February, 1893, each of the defendants herein was a domestic corporation, duly incorporated under the laws of the State of New York, owning and operating a street-surface railroad in the City of Brooklyn, in said State; that on or about the 14th day of February, 1893, the lease mentioned and referred to in the complaint herein, and to which the defendant prays leave to refer as a part of this, its answer, upon the trial of 100
this action when the same shall have been produced and proven, was duly made and executed by each of the defendants under its corporate seal, under and by virtue of a resolution of their respective Boards of Directors, duly passed and adopted; that subsequently, on or about the 14th day of February, 1893, the stockholders of the defendant the Brooklyn Heights Railroad Company, at a meeting duly called for that purpose, duly ratified, confirmed, assented to and appproved said lease by a vote of the stockholders owning

101 at least two-thirds of the stock of said the Brooklyn Heights Railroad Company, present and voting in person or by proxy at said meeting of the stockholders. The total number of votes cast in approval of said lease at said meeting was one thousand nine hundred and ninety-five (1,995) out of a possible two thousand (2,000) votes.

That subsequently and on or about the 15th day of February, 1893, the stockholders of the defendant the Brooklyn City Railroad Company, at a meeting duly
102 called for that purpose, duly ratified, confirmed, assented to and approved said lease by a vote of the stockholders owning at least two-thirds of the stock of said the Brooklyn City Railroad Company, present and voting in person or by proxy at said meeting of the stockholders. The total number of votes cast in approval of said lease at said meeting was eight hundred and six thousand six hundred and thirty-two (806,632) out of a possible nine hundred thousand (900,000) votes.

That at the date of said stockholders' meeting the
103 capital stock of said the Brooklyn City Railroad Company was twelve million dollars ($12,000,000) divided into one million two hundred thousand (1,200,000) shares of the par value of ten dollars each, of which capital there was at the date of said stockholders' meetting issued and outstanding only nine hundred thousand (900,000) shares.

This defendant avers upon information and belief that on the 15th day of February, 1893, the date of said stockholders' meeting, the plaintiff was the owner of
104 one hundred (100) shares of the capital stock of the defendant the Brooklyn City Railroad Company, having purchased the same on or about the 4th day of February, 1893, with full knowledge that said lease was contemplated.

This defendant further avers, upon information and belief, that on the 6th day of June, 1893, the plaintiff was the owner of five hundred (500) shares of the capital stock of the said the Brooklyn City Railroad Company; that on said 6th day of June, 1893, with the consent and approval of the said plaintiff, he then be-

ing such stockholder as aforesaid, the railroads, prop- 105
erty, franchises and privileges described in the said lease mentioned in the complaint, were transferred and delivered by the defendant the Brooklyn City Railroad Company to the defendant the Brooklyn Heights Railroad Company, pursuant to the terms of the said lease.

This defendant further avers, upon information and belief, that upon June 6, 1893, said plaintiff owned five hundred (500) shares of the capital stock of the Brooklyn City Railroad Company; that part of the 106
rental reserved in said lease was an amount which should equal ten (10) per cent. per annum on the par value of the outstanding stock of the Brooklyn City Railroad Company, payable quarterly, on the first days of July, October, January and April, in each and every year.

This defendant further avers, upon information and belief, that subsequent to June 6th, 1893, the said plaintiff received, and on or about the first days of July and October, 1893, and the first days of 107
January and April, 1894, the plaintiff was paid and received dividends equal to ten (10) per cent. per annum upon the par value of his stock in the Brooklyn City Railroad Company, and that said plaintiff so received, and has thence hitherto retained, the same well knowing that each of said dividends was part of the rental paid by the said defendant The Brooklyn Heights Railroad Company under the terms of said lease.

This defendant further avers, upon information and 108
belief, that on the 6th day of June, 1893, the said The Brooklyn Heights Railroad Company deposited with trustees, pursuant to the terms of said lease, the sum of four million dollars ($4,000,000) to secure the payment of the rental reserved in the said lease, and that the majority of the stockholders of the Brooklyn City Railroad Company, relying on said lease and said surrender of possession, subscribed and paid for stock of the Long Island Traction Company in the exercise of the option given them by the terms of "Exhibit A"

109 annexed to the complaint, while others of said stockholders sold and disposed of their option to make such subscription in accordance with the terms of said "Exhibit A," the purchasers of which options have availed themselves of such rights of subscription to the stock of said traction company, and have paid for said stock, and that, since said sixth day of June, 1893, the shares of stock of said traction company have been largely dealt in by the public in reliance upon said lease and the surrender of possession thereunder.

110

Wherefore, this defendant demands that the complaint herein be dismissed with costs.

WILLIAM C. TRULL,
Attorney for Defendant The Brooklyn City R. R. Co.,
Office and Post-office address,
No. 206 Broadway,
New York City.

---

111 STATE OF NEW YORK, }
City of Brooklyn, } ss.:
COUNTY OF KINGS, }

THOMAS P. SWIN, being duly sworn, says that he is the secretary and treasurer of the Brooklyn City Railroad Company, the defendant above named; that he has read the foregoing answer and knows the contents thereof; that the same are true to his own knowledge, except as to such matters as are therein stated to be
112 alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason why this verification is not made by the defendant is that it is a domestic corporation, of which he is an officer.

THOMAS P. SWIN.

Sworn to before me this 22d }
day of October, 1894. }

WM. H. JENNINGS,
[SEAL.] Notary Public,
Kings Co.,
N. Y.

At a Special Term of the Supreme Court, held at the County Court House, in the City of Brooklyn, in the County of Kings, on the 2d day of March, 1896. 113

Present—Hon. William J. Osborne, Justice.

Patrick H. Flynn
against
The Brooklyn City Railroad Company and The Brooklyn Heights Railroad Company. 114

The above-entitled action having been duly reached and called on its regular order on the calendar at this Term for trial thereof, and the parties thereto appearing as follows: James C. Church, Esq., for plaintiff; A. F. Jenks, Esq., of counsel; William C. Trull, Esq., 115
for the Brooklyn City Railroad Company, William C. DeWitt, Esq., of counsel; Julien T. Davies and Charles Francis Stone, Esqs., for the Brooklyn Heights Railroad Company, and William F. Sheehan and Benjamin F. Tracy, Esqs., of counsel; and counsel for the plaintiff having opened the case to the Court for the plaintiff, claiming that, by means of the alleged fraudulent scheme set forth in the complaint, the votes of the holders of more than two-thirds of the stock of the defendant The Brooklyn City Railroad Company had 116
been given in approval of the lease therein set forth, and admitting, only for the purposes of the argument to dismiss upon the opening, that such vote was given, and that plaintiff is the only complaining stockholder, and that the gravamen of this action is that its said lease is a violation of the duties of its directors, and a fraud upon the said The Brooklyn City Railroad Company, the corporation for the benefit of whose stockholders the plaintiff claims to bring this action in a representative capacity;

117 And the defendants having respectively, by their counsel, moved, on the said admissions and statements in said opening and the complaint herein, for a dismissal of the complaint, as not stating facts sufficient to constitute a cause of action;

And due deliberation being had by the Court, it is

Ordered that the said motion be, and the same is hereby, granted, and that the complaint in this action be, and the same is, now here dismissed with costs to each of the defendants, and that judgment be entered
118 accordingly.

Enter.
W. J. O.

(Copy.)
HENRY C. SAFFEN,
Clerk.

Granted March 28th, 1896.
HENRY C. SAFFEN,
[SEAL.] Clerk.
119

SUPREME COURT,

COUNTY OF KINGS.

PATRICK H. FLYNN

AGAINST
120

THE BROOKLYN CITY RAILROAD COMPANY and THE BROOKLYN HEIGHTS RAILROAD COMPANY.

The issues in this action having been brought on for trial before the Hon. WILLIAM J. OSBORNE, Justice, at a Special Term of this Court, held on the 2d day of March, 1896, at the County Court House in the City of Brooklyn, in the County of Kings, and the parties thereto appearing as follows: James C. Church, Esq.,

for plaintiff; A. F. Jenks, Esq., of counsel; William C. 121
Trull, Esq., for the Brooklyn City Railroad Company; William C. DeWitt, Esq., of counsel; Julien T. Davies and Charles Francis Stone, Esqs., for the Brooklyn Heights Railroad Company; and William F. Sheehan and Benjamin F. Tracy, Esqs., of counsel; and counsel for the plaintiff having opened the case to the Court for the plaintiff, claiming that, by means of the alleged fraudulent scheme set forth in the complaint, the votes of the holders of more than two-thirds of the stock of the defendant The Brooklyn 122
City Railroad Company had been given in approval of the lease therein set forth, and admitting, only for the purposes of the argument to dismiss upon the opening, that such vote was given, and that plaintiff is the only complaining stockholder, and that the gravamen of this action is that its said lease is a violation of the duties of its directors, and a fraud upon the said the Brooklyn City Railroad Company, the corporation for the benefit of whose stockholders the plaintiff claims to bring this action in a representative capacity; 123

And the defendants having respectively, by their counsel, moved, on the said admissions and statements in said opening and the complaint herein, for a dismissal of the complaint, as not stating facts sufficient to constitute a cause of action, and the said Court having thereupon ordered that the said motion be granted and that the complaint in this action be dismissed with costs to each of the defendants and that judgment be entered accordingly, and the costs of the defendant The Brooklyn City Railroad Company having been duly 124
adjusted at one hundred and eighty-two $\frac{34}{100}$ dollars; and the costs of the defendant The Brooklyn Heights Railroad Company having been duly adjusted at ninety-five and $\frac{7}{100}$ dollars: Now, on motion of William C. Trull, attorney for the defendant The Brooklyn City Railroad Company, and Davies, Stone & Auerbach, attorneys for the defendant The Brooklyn Heights Railroad Company, it is

Adjudged that this action be, and the same is hereby, dismissed, and that the defendant The Brooklyn City

125 Railroad Company recover of the plaintiff one hundred and eighty-two and $\frac{34}{100}$ dollars, its costs of this action; and that the defendant The Brooklyn Heights Railroad Company recover of the plaintiff ninety-five and $\frac{7}{100}$ dollars, its costs of this action.

Judgment signed and entered this 19th day of May, 1896.

HENRY C. SAFFEN,
Clerk.

126

N. Y. SUPREME COURT,

APPELLATE DIVISION—SECOND DEPARTMENT.

PATRICK H. FLYNN,
127 Appellant,

AGAINST

THE BROOKLYN CITY RAILROAD COMPANY and THE BROOKLYN HEIGHTS RAILROAD COMPANY,
Respondents.

128 Take notice that the above-named plaintiff hereby appeals to the Appellate Division of the Supreme Court in the Second Department from the judgment entered herein in the office of the Clerk of the County of Kings on the 19th day of May, 1896, in above-entitled action brought in the City Court of Brooklyn, dismissing the complaint and for one hundred and eighty-two $\frac{34}{100}$ dollars ($182.34) costs in favor of the Brooklyn City Railroad Company, and for ninety-five and $\frac{7}{100}$ dollars ($95.07) in favor of the Brooklyn

Heights Railroad Company, and from each and every 129
part of said judgment.

Dated May 19, 1896.

Yours, &c.,

JAMES C. CHURCH,
Attorney for Plaintiff and Appellant,
No. 26 Court Street,
Brooklyn, N. Y.

To MESSRS. DAVIES, STONE & AUERBACH,
Attorneys for The Brooklyn Heights Railroad
Company. 130

To WILLIAM C. TRULL, ESQ.,
Attorney for the Brooklyn City Railroad Company.

To HENRY C. SAFFEN, ESQ.,
County Clerk of Kings County.

SUPREME COURT.

131

PATRICK H. FLYNN

AGAINST

THE BROOKLYN CITY R. R. Co. and
THE BROOKLYN HEIGHTS R. R. Co.

I am of the opinion that the motion to dismiss the complaint on the ground that it is defective and in- 132
sufficient should be granted.

It was necessary that the complaint should allege a demand by plaintiff on the Brooklyn City R. R. Co. to bring an action to cancel and annul the lease to the Brooklyn Heights R. R. Co., and a refusal so to do, in order to enable plaintiff to maintain this action (Greaves vs. Gonge, 69 N. Y. R., p. 157; Leslie vs. Lorillard, 31 Hun, 305).

While it is true that such demand has been held unnecessary in actions of this character, where it appears from the complaint that the parties whose

133 fraudulent acts are complained of are still in control of the corporation (Brinckerhoff vs. Bostwick, 88 N. Y., 59), there is nothing in the complaint herein to show that the Brooklyn City R. R. Co. was, at the time of the commencement of this action, under the control of the "certain persons, some of whom were directors" of the Brooklyn City R. R. Co., who, it is averred, designed the alleged fraudulent scheme by which the property and franchises of the "Brooklyn City R. R. Co." were leased to the Brooklyn Heights R. R. Co.
134 Plaintiff has failed to allege any such demand, and I do not think that the allegations in paragraphs XXIX. and XXX. of the complaint can be construed as constituting such demand.

I am also of the opinion that there is nothing in the complaint which would justify the plaintiff in maintaining this action in his own name and for his own benefit to obtain the relief which he seeks.

Greaves vs. Gonge.
Brinckerhoff vs. Bostwick, *supra*.

135

Motion to dismiss granted.

W. J. OSBORNE,
J. S. C.

STATE OF NEW YORK, }
County of Kings, } ss.:

I, HENRY C. SAFFEN, Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York in and for said county (said Court being a court
136 of record), do hereby certify that I have compared the annexed with the original judgment roll and papers upon which the Court acted in making the judgment appealed from, together with the notice of appeal, filed in my office, and that the same is a true transcript thereof, and of the whole of such originals.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county and Court this 23d day of May, 1896.

[SEAL.]

HENRY C. SAFFEN,
Clerk.